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THE CONSTITUTION OF CANADA IN ITS HISTORY AND PRACTICAL WORKING

THE CONSTITUTION OF CANADA IN ITS HISTORY AND PRACTICAL WORKING

BY

WILLIAM RENWICK RIDDELL, LL. D.

Justice of the Supreme Court of Ontario

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TO

ANNA HESTER KIRSOP RIDDELL,

δίᾳ γυναικῶν, ἀρίστῃ κουριδίων,

φιλτάτῃ πάντων,

ΚΑΛΟΚΑΓΑΘΗΙ.

PREFACE

THESE four lectures in the Dodge Foundation are not intended to give a formal and connected account of the Constitution of Canada, but rather a popular exposition in a manner likely to be more acceptable to a non-legal audience.

The subject was not of my own choosing, but was adopted at the instance of friends in Yale University who were good enough to say that the Constitution of Canada might be made interesting to the class of Americans whom these Lectures are expected to reach.

Those desirous of a more extensive knowledge of the subject are advised to consult such works as the following:

"Parliamentary Government in the British Colonies," by Alpheus Todd, C.M.G., etc., 2d edition, London, Longmans, Green & Co., 1894.

"Parliamentary Government in England," by the same learned and accurate writer, 2d edition, London, Longmans, Green & Co., 1889.

"The Canadian Constitution," by E. R. Cameron, K.C., Winnipeg, Butterworth & Co., 1915.

CONTENTS

THE CONSTITUTION OF CANADA

LECTURE I

HISTORICAL

THE turning-point in the history of this Continent, if not indeed in the history of the world, was the Conquest of Quebec by Wolfe in 1759.

Before that time the two Great Powers of Western Europe, Great Britain and France, were not very unequally matched in North America—France being distinctly superior in her management of the aboriginal inhabitants, Britain in the occupation of territory to their exclusion.

The Conquest, followed by the formal cession of Canada, determined for all time that France should not be Mistress of the New World. It was still more important in that by removing the fear of a "natural enemy" to the North, it allowed the English Colonists to pay the greater and the

more effective attention to their own affairs. What many had prophesied, and all should have foreseen, took place: the Colonists demanded self-government as a right, and when they could not have it within the British Empire they went out from the Empire.

The Thirteen Colonies were by no means blind to the advantage to be derived from Canada joining them. A strong printed appeal in French was circulated in Canada; the effect was negligible, the ordinary habitant could not read and such of the French-Canadians as were compelled by their profession to be literate—I mean the priesthood—the Continentalists seemed to take pains to insult and antagonise. Armed force was no more successful than printed persuasion; the skill, courage and endurance of Arnold and his invaders in 1775-1776—and no soldiers, professional or amateur, have ever shown more courage and endurance since or before Xenophon's Ten Thousand—were in vain against the adamant of Quebec, the skill of Sir Guy Carleton and the bravery of his soldiers, British and Canadian.

And so Canada remained true to the British flag.

The loyalty of the French-Canadians to Britain is, at least in part, to be attributed to what is known as the Quebec Act of 1774.[1]

At the time of the Conquest, the condition of Canada was substantially that of a Province of France; so far as the government was concerned, New France was almost a transcript of the old France across the sea.[2]

"The King of France was represented by a Governor appointed by the King—usually a noble who desired to replenish his coffers from the wealth of the new land; he had in Canada much the same powers as the King in France; but he had always with him a watchful guardian of the interests of the King and of France—the Intendant—and the Intendant had also very large powers indeed, particularly in respect of finance, police and justice. Then there was a Council, not elected but appointed, who acted as a combination of judge, lawyer and administrator—the King however could disapprove and thereby nullify any act of theirs.

"There was no such body as a Parliament in the English sense, but the country was governed on feudal principles."

In the country were the nobility—the *noblesse*—the seigniors who owned the land—every Canadian noble was a seignior though some seigniors were not noble. The seigniors paid homage to the King or some intermediate superior,

for subinfeudation was by no means unknown; they had under them the peasants, "habitants" (or rather "habitans") as they called themselves, to whom they leased land to be held on much the same terms as the lands were held by the peasantry in France. This seignioral tenure was introduced substantially by Richelieu in 1627, and remained in great measure practically unchanged in Lower Canada till 1854.

The commonalty called themselves "habitans," as they did not like the word "censitaires" or "roturiers" used in old France to denote those in a similar condition there. These terms were considered to imply a greater degree of dependence upon the feudal lord than the free Canadians were willing to acknowledge themselves to be subject to. We have no English word an exact equivalent of either "censitaire" or "roturier" or "habitant," but "tenant" perhaps comes nearest in meaning.

Not only did a seignior when he succeeded to his estate pay homage to the King or other his feudal superior, but when the seigniory changed ownership by sale or gift or by inheritance other than in the direct line, a part of its value, usually (at least in theory) a fifth part, had to be paid to such superior. It was the custom to remit one-third of this amount so paid, but this custom does not seem to have been enforceable at law.

The seignior, if an individual and not, as sometimes happened, a religious order, also had the privilege of being eligible to be appointed a member of the Superior Council—if the authorities saw fit, he might also have a commission in the militia; for in time of war all the inhabitants of Canada might be called upon to do service in the army under the Governor or other commander. In all but a very few instances, he did not own his land in the fullest sense—the Crown reserved mines, minerals, oak-timber and masts for ship-building, such lands as might be required for military purposes, and the like.

In France, as a rule, the seignior had, as an incident to the ownership of property, the right of exercising judicial powers—in Canada the mere ownership of a seigniory did not carry with it such right. It could be obtained only by express grant. Most of those who had seigniories granted after 1633 received such grant, and some exercised the powers given. Sometimes the judicial power extended to all grades of jurisdiction, high, mesne and low (*haute, moyenne ou basse justice*), sometimes only the mesne and low, and sometimes only the low justice.

The seigniors whatever their powers very rarely exercised the right of *haute justice;* cases of any importance were generally left to the royal courts

to dispose of, whether civil or criminal. There is no record of the death penalty having been inflicted by any seignior, although very many had the power in law to inflict capital punishment.

The habitant as "censitaire" (tenant)—I have pointed out that the words are not precisely synonymous—was under many feudal obligations familiar to readers of Blackstone; for example, he was bound to take his grain for domestic use to be ground at the seignior's mill, and to pay for such grinding usually one-fourteenth of the grain. If he went to another mill, that did not relieve him from paying his seignior; and his punishment might be even greater, for in one judgment it was provided that a habitant who took grain to any mill but his seignior's should be liable to have both the grain and the vehicle carrying it confiscated by the seignior.

In a few instances the *droit de four banal* also existed; the seignior built an oven, and the habitants had to bring their dough to be baked in the oven, paying for the privilege, of course, usually one-twenty-fourth of the bread.

In France there was a long list of "banalités" which the seignior had as an incident to his possession of a fief; but the grist-mill and bake-oven banalities are all that were ever claimed in Canada and they seem to have been exercisable

only because of a clause in the "leases" to the habitants.

If a habitant, being the feudal inferior, desired to dispose of the land which he held, he was obliged to pay a substantial part of the purchase money to the seignior; and worse, the seignior might himself take the land within forty days of the sale. He was liable to the corvée, or forced labour, for his seignior, as in France; he must in some instances give the seignior one fish out of every eleven of those caught in seigniorial waters; wood and stone might be taken from his land by the seignior to build or repair manor-house, church or mill.

But while the peasants had no part in the government of the country, and were inferiors, their lot was immensely superior to that of their brethren in the old land, as they themselves were essentially superior to the peasants of old France in intelligence and manners.

They were free, bold and adventurous, frugal, industrious and moral; and made the very best of soldiers for the kind of country in which they were called upon to fight.

Next to, if not sometimes above, the seignior, was the Curé—sometimes the only one in the seigniory except (or possibly not excepting) the seignior, who could read and write. The essen-

tially religious character of the French-Canadian is seen in the high place the Curé is held in his regard—a place which is but little, if any, lower now than it was a century and a half ago. Indeed it has been said that the Canadian Curé exercised in Canada the power in France of the King, the noble and the priest.

The members of the priesthood—in large measure from old France—were devoted sons of the Church, their love for France not clashing with or excelling their love for their spiritual mother. But neither priest nor peasant had any part in making the laws by which they both were governed; their government was arbitrary and military; they were accustomed to obey their superiors—and anything more unlike a constitution in our latter-day sense than was the mode of government of that happy, fearless, primitive people it would be hard to find.

In 1759 Quebec was taken by Wolfe, and the first period of Canadian Constitutional History came to an end. All Canada in 1760 was under the power of Britain, and the military commanders in the army of the conquerors governed the land as a conquered country. But the religion of the Canadians was not interfered with; Catholics as they were, and their conquerors belonging to a Protestant nation, their law (speaking generally)[3]

based upon the Civil Law of Rome was administered by a conqueror whose law was based on the Common Law of England.[3] Their French customs were respected, the only strange law imposed upon them was the criminal law of England, which was more merciful than their own, which permitted torture, breaking on the wheel and arbitrary imprisonment.

Except as modified by the legislation of Canada herself, the English Criminal Law has ever since been in force, and no complaint ever was heard from the Canadians and no desire to return to the French system.

The definitive treaty between Great Britain and France—the Treaty of Paris signed 10th February, 1763—placed the allegiance of Canada beyond any doubt, as by that instrument France ceded her to Great Britain. It was not, however, till October of that year that any change was made in the government of the new country, thereby inaugurating the third period of our Constitutional history. On the 7th October, 1763, a Royal Proclamation was issued establishing in "the extensive and valuable acquisition in America four distinct and separate Governments . . . Quebec, East Florida, West Florida and Grenada."[4]

Quebec, with which alone we are concerned, is defined in the Proclamation in such a way as to

make it wholly impossible to follow the description,[5] and indeed no good end would be achieved by ascertaining the precise meaning of the words used.

Whatever may have been in the mind of the draughtsman of this description, it was considered effective to form a "Government" called Quebec as a political entity. By this Royal Proclamation, the Governor was given power, with the advice and consent of the Council, to summon and call General Assemblies, and the Governor with the consent of the Council and Representatives was to make laws for the welfare and good government of the Colony "as near as may be agreeable to the laws of England." He was also, with the advice of the Council, to erect Courts of Justice to hear and determine all causes "as near as may be agreeable to the laws of England" with right of appeal to the Privy Council at Westminster.

It will be at once apparent what a tremendous change was intended to be brought about under this Proclamation. The Canadian had lived under a feudal system, looking up to and relying upon his seignior or feudal lord; there was now to be an Assembly of Representatives, though few of the Canadians could have any part in selecting the members: the former civil law under which

they were born and had lived was to be wholly abolished and the English law introduced, old customs were to become naught and all was to be in confusion. Courts of King's Bench and Common Pleas were in fact established and Justices of the Peace were appointed with inferior jurisdiction.

While in name and theory, the English law was in force in civil matters, in fact, it was found impracticable to apply it to the full extent, and great uncertainty prevailed. Many if not most of the English-speaking inhabitants of Canada came from the English colonies to the South, some, too, came from England; and these, Anglo-Saxon fashion, practically monopolised the control of the country—and they appear to have "run" the Courts as well. The many French-Canadians and the few British-Canadians found it impossible to agree; complaint and countercomplaint were made to the King.

An Executive Council was formed, consisting of a group of officials appointed by the Governor (this was not unlike the old régime) and in it, many well-known men of the Canadian *noblesse* found a place.

The French-Canadians ignored the provisions for an Assembly and it seemed impossible to get them to take any interest in a movement for such

a body: it was not thought practicable to institute a representative chamber under such circumstances. Petitions were presented to the Governor signed by the British residents only, asking for a Legislative Assembly, but the Governor reported to the Home Government that the Canadians had refused to join in the petition. The main, though not perhaps the only difficulty, lay in religion. While the French had been by the Treaty of Paris assured of the free exercise of their religion, it was apparent that no Roman Catholic could be admitted to a British Parliamentary body consistently with the principles then professed in reference to Parliament in the United Kingdom—while it would be absurd to expect that the numerous French-Canadian Catholics would submit to be governed by a handful of Protestants, not one-hundredth of their number. The English did not want an Assembly with Roman Catholics in it; the French would not have one without.

The English-speaking part of the community, of whom the early Governors sometimes speak in no very flattering terms, objected even to the French Catholics sitting on their own juries in their own Courts, and often acted in a most arbitrary and intolerant manner. The land was in a state of chaos, and the whole legal machinery paralysed. The Canadians did not like juries,

expressing their wonder that the English should think their property safer in the determination of tailors and shoemakers than in that of their Judges—besides jury trials cost too much; the English had then the same firm belief in the jury system which characterises some of their descendants to this day.[6]

Finally in June, 1774, the Quebec Act[7] passed the Houses of Parliament at Westminster, and the fourth period began. Notwithstanding the vigorous protest of the Corporation of London, (influenced probably by the English in Quebec and certainly affecting to act in their interest), "that the Roman Catholic religion, which is known to be idolatrous and bloody" was "established by this bill"; and notwithstanding that the King was reminded by them that his family had been called to the throne in consequence of the exclusion of the Roman Catholic ancient branch of the Stuart line (and he was solemnly told that the failure to provide in civil cases for jury trials, "that wonderful effort of human reason," was a breach of the promises made to British immigrants, and violated His Majesty's promises in His Proclamation of 1763), George III signed the bill, and it became law.

After the bill was passed it was petitioned against and its repeal urged by "His Majesty's

most loyal and dutiful . . . ancient subjects settled in the Province of Quebec," but in vain.[8]

This Act defined the Province of Quebec as containing all the territory now the Provinces of Quebec and Ontario and the "hinterland" of the English colonies to the South, down the Mississippi to Louisiana.[9] The Proclamation of 1763 was annulled, Roman Catholics were permitted to enjoy the free exercise of their religion and their clergy to receive their accustomed dues—all matters of property and civil rights were to be decided according to the laws of Canada, *i.e.*, French-Canadian laws, but the criminal law of England was to continue. A council appointed by the King was provided for which should legislate for the Colony, and there was to be an executive council of five as a Privy Council—the scheme for a representative and elective assembly contained in the Proclamation of 1763 was not continued in the Statute,—the Statute, notwithstanding Fox's protest, declaring it "inexpedient to call an Assembly."[10]

During the time the Quebec Act was in incubation, we see no signs of disloyalty on the part of the French-Canadians; and indeed there could hardly be a real desire on their part to join the discontented colonies.

It is hard to see how a French-Canadian Catho-

lic could imagine that his lot would be bettered by joining with the people of New England, the hated Bastonais, his hereditary foes. We know that in the Thirteen Colonies, both pulpit and Congress expressed the greatest alarm at the toleration of popery, that "blood-thirsty, idolatrous and hypocritical creed," and loudly denounced the betrayal of Protestant principles, shown in allowing the free exercise of their religion to the Catholic Canadians.

Notwithstanding the Address of the Continental Congress of 1774,[11] filled with philosophy and appeals to Beccaria and Montesquieu, which was signed by Henry Middleton, President, translated into French and printed in that language in Philadelphia, and then generally distributed among the Canadians, they remained loyal to the British Crown—Sir Guy Carleton "pursuing the exact reverse in every particular of the infatuated policy which alienated and lost to the Empire the Thirteen Colonies."

Some of the seigniors who, at this time, endeavoured to exercise in favour of Britain their feudal right to call the habitants of their seigniories into the field, found them refractory: they refused to bear arms for the conquering British—but at the same time they did not join the Americans in any considerable numbers.

There can be little, if any, doubt that the Quebec Act helped to reconcile the leaders of the Canadians to British rule and so played no small part in assuring the loyalty of French-Canada to the Empire.

The first Legislative Council under the new system met in August, 1775, the Act coming into force, May 1 of the same year.

The inhabitants of what is now called Quebec remained in great part French; and as to those in that part of Canada there was little trouble arising from the provisions of the Quebec Act. The English remained discontented for a time with the change in the law in civil matters, but experience showed that Canadian law, based as it was on the Civil Law, was not much different from the English law in commercial matters, which were the concern of many of the English-speaking inhabitants.[12] The English criminal law was not objected to by the Frenchman,—bloody as it was, it was less barbarous than his own.

In Lower Canada, the disputes between the old and the new Canadians, the recent and the ancient subjects of the Crown, had continued. Of the twenty-two members who formed the first Legislative Council, eight indeed were French and Catholic, the Oath of Supremacy having been waived in their favour;[13] but the English persisted

in their attempts to shew "the d——d Frenchmen the difference between the conquerors and the conquered"—they feared or pretended to fear their loyalty, charged them semi-officially with being "rank rebels"; and in general acted as "patriots" (self-styled) are wont to act.

That was not the only difficulty—the Revolutionary War caused the immigration into the western part of Canada, afterwards Canada West,[14] of a very large number of Loyalists who had left home and property to follow their flag and retain their allegiance. These were accustomed to English law and customs, and fretted under the foreign law to which they were subjected in Canada.

The French law and customs seemed to these vigorous and sturdy Anglo-Saxons absurd and intolerable: and the Protestantism of the newcomers was repulsive to the devout Catholic French-Canadians. The United Empire Loyalists had come from the New England States and elsewhere in the Thirteen Colonies and had been accustomed to freedom and a large measure of self-government; they could not tolerate the irresponsible control of an appointed council, and petition after petition made its way to the King claiming relief.

The Home authorities at length acceded to the request of the new colonists in the West who by 1790 were more than 30,000 in number; and what is generally known as the Constitutional Act[15] was passed by the British Parliament in 1791. The Act was promoted by Pitt, and naturally met with strong opposition. Before the bar of the House of Commons there was heard a representative of the English colonists in Quebec, the well-known Adam Lymburner; he vigorously protested against any division of the province, and demanded instead, the repeal of the Quebec Act. In the House were heard the usual arguments against Roman Catholics being admitted to a share of the government and against the imposition upon free-born Britons of foreign law which determined rights by the agency of judges instead of juries, whose rules were those derived from the Roman law and not from the semi-divine Common Law of England. The merchants in London having trade relations with Canada also petitioned against it. Fox attacked the bill as not liberal enough—he thought that Canada should have a constitution consistent with the principles of freedom. He also criticised the provision for the setting aside of lands for the support of the Protestant clergy, and objected to the division of the Colony into two parts of which one would

necessarily be almost wholly French, the other English.

All opposition, however, was overborne by Pitt. By this Act,[16] which brought in the fifth period, Canada was divided into two parts, Canada East or Lower Canada, and Canada West or Upper Canada (now Quebec and Ontario). To each were given a Legislative Assembly to be elected by the people and an upper house called the Legislative Council, whose members were nominated for life by the Crown. The Crown also appointed all the public officers, including the members of the Executive Council for each Province. The free exercise of the Roman Catholic religion was once more guaranteed; and the Crown agreed to set aside one-eighth part of all unallotted Crown lands for the support of a Protestant clergy. The Home authorities, also, reserved the right to levy duties for the regulation of navigation and commerce.

The object of this Act is described by Lord Granville to be to "assimilate the Constitution of Canada to that of Great Britain as nearly as the difference arising from the manners of the people and from the present situation of the Province, will admit."

In Upper Canada the first Provincial Parliament met at Newark (now Niagara) in 1792: and

from that time onward the flood of legislation has never failed. Courts were established, the laws of England introduced, new laws made. The Colony rapidly increased in population and wealth—in twenty years the population of Upper Canada was estimated to have risen to 77,000—and there were generally reasonable harmony and good will.

In Lower Canada, the English and French-Canadians continued to quarrel till the War of 1812 brought about at least an external peace.

But in both Canadas, the curse of an appointed and irresponsible executive became more apparent as time went on, riches increased and affairs became more complex—benevolent despotism does not answer for any but the simplest communities.

In the Upper Province, the Executive Council became an oligarchy, nominated by the Governor from among public officers, judges, bishops, members of the Legislative Council, etc. These were a privileged class, monopolised the offices, obtained large grants of land and generally acted as irresponsible favourites of royalty are wont to act.

The Legislative Assembly fought against this tyranny; but the placemen long bade defiance to the popular body.

The nominated Legislative Council, too, formed on the model of the House of Lords (but not hereditary),[17] claimed and exercised the right to

reject and even to amend money bills—and as the Crown had a permanent civil list, the Legislative (*i.e.*, the representative) Assembly was helpless.[18]

Fierce conflicts arose, the representative body claiming that the Ministers of the Crown should be responsible to them—but the body of office-holders, who were connected by social ties, common interest and sometimes family relationship—and who were accordingly called the "Family Compact"—resisted all attacks.

A rebellion, largely due to the obstinate folly—or worse—of the Governor, broke out at length in 1837, but it was quickly quelled—Canadians have always been too loyal to permit of the success of a rebellion against the Crown.

In Lower Canada, matters had taken even a worse course—the minority who were English in blood and spirit had grown not only in numbers but in influence—most of the Legislative and Executive Councillors were selected by the Governors from their ranks. The French-Canadians, loyal as they were, were looked upon still as a conquered people and were to be "kept in their place." The Assembly was naturally almost wholly French and Catholic—while the Councils were largely English and Protestant. The Anglo-Saxon never forgot his dearly prized superiority—his race and language continued to be the very

best. When a Governor replied to the Address from the Assembly in French before speaking in English, he was roundly denounced by the English press. His right to speak publicly any language but his own was denied, and the precedence given to the French language was "a base betrayal of British sovereignty" and "would lead to the degradation of the mother country." One of the ablest of their advocates went so far as to say, "Lower Canada must be English at the expense, if necessary, of not being British"—language as significant as it is intelligible.

Most of the troubles, however, were financial. The Assembly made the same claims as its sister Assembly in Upper Canada and with the like success—or want of success.

Petitions were sent to the Home Government by the outraged majority, but in vain. The English-Canadians openly expressed their purpose to make Quebec an English colony—and in Lower Canada also a rebellion broke out—and this also was quickly quelled. The two movements were largely independent of each other, although the "Patriots," alias "Rebels," in each province were in communication with those in the other.

At this stage, the Government at Westminster induced John George Lambton, Lord Durham, to go to Canada and make a thorough investigation

into the causes of the troubles and to suggest a remedy. Lord Durham's Report is still an inexhaustible well of fact from which all future historians, constitutional and otherwise, must draw. His profound sympathy with all efforts toward freedom, his knowledge of the Constitution of the Motherland and his broad human outlook, all fitted him for his task. It is not too much to say, that all Canadians and all lovers of Constitutional and Representative Government throughout the British world, owe John George Lambton an eternal debt of gratitude.

As the result of his efforts, the Queen's Message in 1839 recommended the Union of Upper and Lower Canada; but the Government got into trouble, and moreover there was much difference of opinion in Parliament. Finally, however, the broad Imperial views of Lord Durham—because Lord Durham was an Imperialist in the sense in which we now use the term—made their impression upon Lord John Russell and the Prime Minister; and in 1840 the Union Bill drafted by Sir James Stuart was introduced into the House of Commons by Lord John. It was passed without much change or opposition, received the Royal assent July 23, 1840, and came into force in February, 1841, and thus began the sixth period.

The main characteristic of the constitution

given by this Act is that Responsible Government was now at length granted—Her Majesty's Government in Canada were responsible to the people of Canada and not simply to the Home authorities. Before this, while full legislative powers were given to the Provinces, Responsible Government was withheld—and the only remedy the people had when their grievances grew acute, was to refuse supply.

By the Union Act, however, much was to be changed. The two Provinces became the Province of Canada, for which a Legislative Assembly was to be elected with forty-two members from each section. A Legislative Council was to be nominated by the Governor, not less in number than twenty, increased from time to time as should be thought fit, the Councillors to hold office for life. The Council was to be presided over by a Speaker appointed by the Government; the Assembly was to elect its own Speaker. All written and printed documents referring to the election of members, summoning and proroguing of the Legislature, and proceedings of either House, were to be in English alone. The laws in force in either section of Canada were to continue in force until repealed or amended; and courts were continued, etc. The territorial and other hereditary revenues of the Crown were surrendered for a fixed sum—and it

may be said in general that the new Constitution was as exact a copy of that of the United Kingdom as circumstances would allow.[18] Lord Durham wrote that it was not "possible to secure harmony in any other way than by administering the government on those principles which have been found perfectly efficacious in Great Britain," and while he would not "impair a single prerogative of the Crown," and he believed "that the interests of the people of these provinces require the protection of prerogatives which have not hitherto been exercised"—still "the Crown must submit to the necessary consequences of representative institutions."

The population of Lower Canada was at this time about 630,000, while that of Upper Canada was about 470,000—the Lower Canadians felt that it was an injustice that they should have no more members than the Upper Province—those in the Upper Province thought that three English-speaking Canadians were worth at least four French-Canadians,—this grievance, as we shall see, changed face before many years. The French-Canadians also felt aggrieved by the proscription of their language. Their complaints were not unnatural—the provisions complained of arose from Lord Durham's view that it was necessary to unite the two races on such terms that the

English would be given the domination. He said, "without effecting the change so rapidly or so roughly as to shock the feelings or to trample on the welfare of the existing generation, it must henceforth be the first and steady purpose of the British Government to establish an English population, with English law and language in this Province, and to trust its government to none but a decidedly English legislature."

This object wholly failed of fulfilment,—and I venture to think it will continue to fail of fulfilment, so long as the French-Canadian mother continues to do her part as she has been doing it—the French remained French and their influence in Parliament steadily increased. They had been ostracised politically by the first Governor, and the acceptance by his successor of a Government with a French-Canadian at its head, struck the High Tory Duke of Wellington with horror and dismay. The first Legislative Council of twenty-four members contained eight French-Canadians.

At first the government was conducted on the principle that the French were inferior; but this idea speedily vanished, and before long, prominent French-Canadians became not only members, but in large measure masters of the Administration.

The Home administration had retained the

power of veto upon all acts of the Legislature by means of the Governor, an Imperial Officer; and it seemed as time went by almost impossible for those in the Colonial Office (or indeed in any of the offices of the Imperial Government) to learn that Parliamentary Government meant the same thing in Canada as in England, and that Canadians, French or English, were much more capable of understanding and deciding what was proper for their country than any Islander in London could be.[19]

The Governors in Canada came in conflict from time to time with the Legislatures who claimed all the rights of the British Parliament: but on the whole, the new Constitution worked well; and at length the responsibility of the administration to the people's representatives was fully admitted.

The two parts of the Province were of such different laws, manners, etc., that much of the legislation was for one only of the Canadas; and gradually the working theory arose that a ministry must command a majority of the members from each part. This produced endless difficulties; and it was the cause of much intrigue and "log-rolling."

The Upper Province rapidly increased in wealth and population, overtaking and passing the Lower Province by 1850; and many of its public men

complained of the provision, formerly favourable to their section, that each part should have the same number of representatives. Representation by Population—"Rep. by Pop.," as it was generally called—became a watchword of a whole political party[20] in Upper Canada.

When the Ashburton-Webster Treaty was made in 1842—the "Ashburton Capitulation," as Lord Palmerston called it—and Maine was thrust like a wedge between Canada and the British colony to the east (without consulting either colony), the attention of all British Americans was called to the necessity of a highway between the divided colonies; this plan gave way to a scheme for a railway, an "Intercolonial" railway; and in 1852 the Governments of Canada and New Brunswick agreed to build a line down the valley of the St. John. But this plan passed from an active stage when the Colonial Minister at Westminster refused to guarantee the cost. From that time on, however, Canada, New Brunswick and Nova Scotia never wholly lost sight of the project; and various attempts were made to revive it.

These and other matters influenced statesmen of all parties and provinces to seek a remedy: and the plan of Lord Durham outlined in his Report, for the Confederation of all the British American Colonies was from time to time made the subject

of discussion. He was the first man in a responsible position to recommend the union of all the British American Colonies.[21] As early as 1858 a responsible Minister of the Crown in Canada, Mr. (afterwards Sir) Alexander T. Galt, openly advocated it and moved for the appointment of a committee to ascertain the views of the people of the Lower Provinces and of the Imperial Government. In 1861 Mr. (afterwards Sir) John A. Macdonald (first Prime Minister of the Dominion of Canada), while opposing the principle of "Rep. by Pop.," said that the only feasible scheme as a remedy for the evils complained of was a Confederation of all the Provinces. And at length in 1864 he effected an agreement and a coalition with his strongest political foe, Mr. George Brown,[22] to secure this object.

Before this time the Colonial Secretary at Westminster had assured the Governor-General that any union, partial or complete, suggested with the concurrence of the Colonies themselves, would be most favourably considered by the Home Government.

The Lower Provinces had tired of the fruitless negotiations with Canada, and had in the session of their respective Parliaments in 1864 authorised the appointment of delegates to discuss and if possible to bring about a union of the Maritime

Provinces, *i.e.*, New Brunswick, Nova Scotia and Prince Edward Island. A meeting of these delegates had been set for September 1, 1864. The Canadians felt that it would be advisable to take advantage of this opportunity; and accordingly eight members of the Coalition Government of both sides of politics, went to Charlottetown, Prince Edward Island, met the Conference and were asked to and did express their views. The Maritime delegates are understood to have come to the conclusion that a Maritime Union was impracticable, but that a union on the larger basis might be effected. In order that the feasibility of such a Confederation might be discussed and considered from every point of view, the Charlottetown Conference was adjourned; and it was agreed to hold another Conference at Quebec, to be attended by delegates from all the provinces interested. This Conference met in the Parliament Buildings, Quebec, October 10, 1864, and was attended by delegates from Canada, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland; resolutions were adopted which formed the basis of the British North America Act subsequently passed, which established the Dominion of Canada.

Beyond any question, the American Civil War and the "Trent affair" of 1861 had much to do

with hastening the movement for Union. So also had the anticipated "revocation" of the Reciprocity Treaty; and when this Treaty was in fact abrogated in 1866, its abrogation had no little effect in hastening matters to a conclusion—but into that I cannot enter here; it is too complicated and extensive a question.

The Imperial Government expressed their approval of the proposed scheme as soon as it was brought to their notice (with two exceptions of no moment for our present discussion).

Both Houses of Parliament in Canada approved of the scheme in 1865 by large majorities; the New Brunswick Government, however, met with defeat at the polls when they ventured on an appeal to the electorate without bringing the question before the Legislature. The Nova Scotia House of Assembly in 1866 gave their adherence to the project by a majority vote of 31 to 19; and in the same year the former Government in New Brunswick were returned by a large majority at a new election; this new election had been ordered by the Governor through what many would consider a piece of sharp practice—the whole story certainly makes amusing reading. The House in that Colony then approved the plan a large majority.

In 1865, and again in 1866, Prince Edward

Island by her Legislature in emphatic terms refused to enter into the proposed Union. Canada, New Brunswick and Nova Scotia sent delegates to England for the necessary legislation by the Imperial Parliament. Prince Edward Island was again invited to join, and its representative, the Premier, then in London, was favourably impressed with the terms offered; but on his return home, his Government was defeated. Newfoundland declined to come into the Union.

Accordingly the British North America Act[23] was passed by the Parliament at Westminster in 1867, creating the Dominion of Canada, composed of four Provinces, Ontario (formerly Upper Canada), Quebec (formerly Lower Canada), Nova Scotia and New Brunswick. On July 1, 1867, was the first "Dominion Day" celebrated.

It will now be proper to go back and say a word on the Constitutional History of the two Maritime Provinces.

The French had been strangely blind to the importance of the seaboard of North America: and while they had some settlements on the Island of Cape Breton, they left the Atlantic shore of Nova Scotia in great measure to the English. A considerable number of Acadians were settled in the Annapolis Valley near Port Royal, and some in other parts of Nova Scotia: and in these settle-

ments the feudal system was in force as in Quebec, but this was not the case where the English had settled.

We may term the period of French rule the first period also in Nova Scotia's Constitutional History. There was no clean-cut period of military rule as in Quebec and we may without violence to language consider the second period as beginning with the Commission from King George I to Colonel Richard Phillips, dated July 9, 1719. For while there was much of Nova Scotia still French, the regular rule of the English was established at Annapolis Royal under that instrument.

By this Commission, Colonel Phillips as Governor was empowered to appoint fitting and discreet persons not exceeding twelve in number to form a Council for the Province, and in 1720 on his arrival, via Boston, at Annapolis, he appointed ten Councillors, all but one from those officially connected with the garrison. An Assembly was suggested by Governor Armstrong as early as 1731 and again the following year; and at length in 1748 Governor Shirley prepared and submitted a plan for the government of the Colony. This plan which contemplated a Charter based upon that of Massachusetts failed to be accepted. After the termination in 1748 of the

war between Britain and France, Halifax was founded (in 1749) and became the seat of Government; and while for some years the Governor ruled with the assistance of a Council alone, his instructions contemplated also an Assembly elected by the people. Such an Assembly met for the first time in 1758 with nineteen members—ushering in the third period.

There were the usual quarrels between the Houses over privilege, etc. Roman Catholics were admitted in 1781 and as early as 1790 there were disputes over money bills. As elsewhere the popular House "daringly opposed the King's Government," and shortly after the opening of the century there seems to have been a kind of "Family Compact" in the Council. As time went by, the demand for Responsible Government which had been at first somewhat inarticulate became more and more insistent.

A real "Cabinet" makes its appearance by 1842 and by 1848 is thoroughly established without change of the form of government by legislation: and thus the third period with an appointive Council and an elected Assembly but with the principle of responsibility of the Administration to the lower House continued till Federation in 1867 under the British North America

Act of that year—when she began her fourth period (*fiat aeterna*).

Nova Scotia or Acadie was composed originally of what is now the peninsular part of Nova Scotia, New Brunswick, part of Quebec south of St. Lawrence and part of Maine down to the Kennebec. Cape Breton was annexed to Nova Scotia in 1820 having theretofore been a separate Colony; and New Brunswick had been cut off in 1784. With New Brunswick went the portion of Quebec and Maine. Members from part of what became New Brunswick had, however, sat in the Nova Scotia House of Assembly as early as 1765.

At the time of its separation from Nova Scotia, New Brunswick had only about 16,000 inhabitants: but a separate Government was formed, the Governor (Thomas Carleton, brother of Sir Guy Carleton, Lord Dorchester, but a different kind of man), a Council of nine members and in 1786 a Legislative Assembly.

In New Brunswick the same kind of struggles took place as in Canada and Nova Scotia: the particular incidents were somewhat different but the contending principles the same. By the time of Confederation, however, New Brunswick was in the same happy condition as its sister colonies.

New Brunswick accordingly had her five

periods—the first until 1719 under French rule, the second 1719 to 1758 under Governor and Council, the third from 1758 to 1784 in connection with and part of Nova Scotia, the fourth from 1784 to 1867 as a separate colony, and the fifth as a Province of Canada.

Although Prince Edward Island refused to become part of the Dominion in 1867, Canada did not despair: in 1869 another offer was made to Prince Edward Island, but this was also refused. Negotiations, however, renewed in 1872 were more successful,—they had got into financial difficulties in that little Province,—and the Island joined the Dominion as a Province, July 1, 1873, the formal Order-in-Council being dated at Windsor, June 26, 1873.

Prince Edward Island was originally called Isle of St. John. It was apparently discovered by Cabot but was claimed by the French, who established there a few fishing stations. After the Treaty of Utrecht many Acadians made their homes in the Island and brought their laws and customs with them, but the British took possession in 1758 on the capture of Louisburg; in 1763 the Island was formally ceded to Britain and in the same year placed under the government of Nova Scotia.

Lord Egmont tried to get a grant of the

Island but failed, and in 1767 it was practically all granted to a number of persons on condition of their bringing in settlers, etc. In 1769 it was made a separate Colony and a Governor appointed, arriving in 1770. He was commanded in his instructions to call a "lower house of representatives," and in 1773 the first Assembly met. Before this from 1770 the Governor had acted by and with the consent of a Council as in the other Colonies. The main difficulties in this Island arose from the land having been granted to a few proprietors; and these difficulties were rather economical than constitutional. There was, however, not a little of the same want of harmony between the elected and the appointed with the Governor and the Home authorities. And well before 1867 Prince Edward Island (she received this name in 1799) was abreast of her sister colonies in Responsible Government.[24]

In the meantime the Dominion had in 1870 bought out the Hudson Bay Company; and out of part of the territory so acquired was formed the Province of Manitoba by Act of the Dominion Parliament.[25]

In the far West was the Island of Vancouver, made a separate Colony in 1859, but reunited with the mainland in the Colony of British Columbia in 1866 (the mainland of British Columbia re-

ceived Representative Government in 1858). In 1870 an arrangement was entered into that this Colony should also join the Dominion upon condition of the construction by Canada of the Canadian Pacific Railway. The union was effected July 30, 1871, by an Order-in-Council at Windsor, May 16, 1871.

More recently two more Provinces have been formed out of part of the enormous territory of our Great West, *viz.*, Alberta and Saskatchewan, constituted by the Acts of the Dominion Parliament,[26] coming into force September 1, 1905.

The remainder of the Continental British territory is divided into the Yukon and Northwest Territories under Territorial administration, and Labrador, this last under the care of Newfoundland.

Newfoundland had been officially represented at the Quebec Conference, and the resolutions of the delegates to the Quebec Conference contained a provision that she might enter the proposed Union, and they set out the terms upon which she might do so. The British North America Act made provision for such a proceeding; and there were negotiations of a more or less informal kind looking to her coming into the Dominion. In 1868 terms of Union were arranged with the Government of the Island, but that Government suffered

defeat at the polls and the arrangement was not carried out. At least once since that time, representatives from the "Ancient Colony" have come to Ottawa with a view to their country uniting her fortunes with those of the Dominion; but the negotiations proved abortive; and Newfoundland still stands alone.

The Dominion of Canada has thus her nine provinces, all of which have (speaking generally) the same legislative rights and powers.[27]

NOTES TO LECTURE I

[1] 14 George III, c. 83.

[2] The quotations following are from an address on *The Constitutional History of Canada* by myself delivered before the Canadian Club of Toronto, November 6, 1911.

[3] I say "speaking generally," but where laymen like soldiers are called upon to decide cases at law, they are apt to go by the light of nature or by what they have understood to be law. In some instances the Commanders were known, and in more suspected, to have decided according to their own view of right or the law to which they had been accustomed (as they understood it) rather than the law and customs of the conquered people. That is to be expected in every conquered country.

The terms of surrender are set out in Kingsford's History of Canada, Vol. IV, pp. 400 *sqq.*

[4] The full text of this Proclamation will be found in Vol. III of the Report of the Canadian Archives, 1907, "Documents relating to the Constitutional History of Canada, 1759-1791," by Drs. Adam Shortt and Arthur G. Doughty, pp. 119 *sqq.* (English edition). All but the description of the three Provinces of East Florida, West Florida and Grenada is given in Kingsford's History of Canada, Vol. V, pp. 142-145.

[5] "The Government of Quebec bounded on the Labrador Coast by the River St. John, and from thence by a line drawn from the head of that River through the lake St. John to the South end of the Lake Nipissim; from thence the Said Line crossing the River St. Lawrence and the Lake Champlain in 45 degrees of North Latitude, passes along the High Lands which divide the Rivers which empty themselves into the said River St. Lawrence from those which fall into the Sea; and also along the North Coast of

the Baye des Chaleurs and the Coast of the Gulph of St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River St. John."

The terminology "the Highlands which divide those rivers that empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean" is used to express one of the boundary lines between the territory of the United States and that of Britain in the Definitive Treaty of Peace concluded September 3, 1783, Article II following No. II of the Provisional Articles concluded November 30, 1782. "Treaties and Conventions concluded between the United States of America and other Powers since July 4, 1776." (Washington, Government Printing Office, 1889, pp. 370, 371, 376.)

As is well known there arose much difficulty in fixing this line. In 1803 a Commission to settle it was agreed to by Lord Hawkesbury (afterwards Earl of Liverpool) and Rufus King, the American Minister; but this the Senate of the United States refused to ratify. In the negotiations at Ghent in 1814, the British Commissioners endeavoured to have the line revised; but the American Commissioners declined, and it was agreed by Article V of the Treaty of Ghent ("Treaties," etc., p. 402) to leave the dispute to two Commissioners, one on each side, named by the King and the President respectively. If the Commissioners could not agree they were to report to their Governments and the matter was to be referred "to some friendly sovereign or State." The King named Thomas Barclay of Annapolis, Nova Scotia, a pupil of Jay's, who, born in New York State, had fought on the Loyalist side during the Revolution and attained the rank of Colonel. He afterwards practised law in Nova Scotia, and became a member and Speaker of the Legislative Assembly; he was also for a time British Consul at New York: the American Commissioner was Cornelius P. Van Ness, subsequently Chief Justice and Governor of Vermont. They were unable to agree and so reported. It

therefore became proper to appeal to "some friendly sovereign or State." A convention was entered into September 29, 1827, under which William, King of the Netherlands, was chosen arbitrator. January 10, 1831, he made an award; the American Minister promptly protested against it, and the British Government did not insist. The line was afterwards settled by diplomatic negotiation by Ashburton and Webster, and is set out in the Ashburton Treaty of August 9, 1842.

6 While in Canada everyone charged with a serious criminal offence has a right to be tried by a jury if he so desires, we in Ontario have got rid of trial by jury in the vast majority of civil cases. In the Supreme Court not 25 per cent of civil cases are tried by a jury and in the inferior Courts a still smaller percentage are so tried. Except in a small class of cases, the trial Judge has the power constantly exercised of striking out a jury notice even if one party or the other desires trial by jury. There is no feeling against the practice, and we are about in the state of the French-Canadians of a century and a half ago in our estimate of the comparative value of Judge and jury as a trial tribunal, and expense is still a matter of consideration to us. As I said to the Illinois Bar Association in an address delivered at Chicago May 20, 1914:

"In more than thirty years' experience I have known of only two appeals against the action of a trial judge in striking out a jury notice—both unsuccessful.

"The saving of time—and wind—is enormous. The opening and closing speeches of counsel to the jury and the charge of the judge are done away with; in argument there are very few judges who care to be addressed like a public meeting and quite as few who are influenced by mere oratory—all indeed must *ex officio* be patient with the tedious and suffer fools gladly. Vehement assertion, gross personal attacks on witnesses or parties, invective, appeal to the lower part of our nature, are all at a discount; and

in most cases justice is better attained, rights according to law are better ensured. Moreover during the course of a trial a very great deal of time is not uncommonly wasted in petty objections to evidence, in dwelling upon minor and almost irrelevant matters which may influence the jury, wearisome cross-examination and reiteration, etc., all of which are minimised before a judge.

"But it is never to be forgotten that the courts belong to the people, and the wishes—even the prejudices—of the people must be borne in mind. If for any reason the body of the people were to come to the opinion that a judge trial was not a just trial, justice would not be satisfactorily administered if that form of trial were adopted."

Of course it has often been and occasionally still is said that trial by jury is the Palladium of our liberties, but I venture to think that if our liberties get in so bad a way that it requires such a Palladium to save them, jury trial will be quite as ineffective as the original Palladium was to save Troy.

[7] The full text of this important Statute will be found in the Report of the Canadian Archives already cited, pp. 401 *sqq.* Petitions of French and of English subjects, etc., will be found pp. 354 *sqq.* Petitions for the repeal of the Act, pp. 414 *sqq.*

[8] "Ancient" subjects from the old land or the American Colonies to distinguish them from the "new" subjects, the French-Canadians. Zachary Macaulay, the father of the celebrated Thomas Babington, Lord Macaulay, was one of the petitioners.

[9] Those who have studied botany may have noticed certain plants described as "Canadensis," "Canadense," which are not found in what we now call Canada at all. This is explained by the fact that when the botanical terminology was fixed, Canada included practically all the territory bordering on the Mississippi down as far as Louisiana.

[10] The fact is that it was not thought safe to trust power

to a Roman Catholic Legislature. Religious feud dies hard; the A. P. A. is still alive even in this land of tolerance and freedom.

[11] An English translation of this address (the original is in the Library of Congress) will be found in Kingsford's History of Canada, Vol. V, pp. 262 *sqq*. The chief grounds of complaint which Congress thinks the "Friends and Fellow Subjects" in Canada have are having (1) no share in the government, (2) no trial by jury, (3) no writ of Habeas Corpus, (4) no tenure of land by easy rents, (5) no freedom of the press.

In the Address by the Congress to the People of England dated from Philadelphia, September 5, 1774, the Quebec Act is said to be "hostile to British America." The Address goes on: "We cannot help deploring the unhappy condition to which it has reduced the many English settlers. . . . They are now the subjects of an arbitrary Government, deprived of trial by jury and when imprisoned cannot claim the benefit of the habeas corpus act, that great bulwark and palladium of English liberty; nor can we suppress our astonishment that a British Parliament should ever consent to establish in that Country (Canada) a religion that has deluged your island in blood, and dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world." Kingsford's History of Canada, Vol. V, pp. 246, 247, note.

It is a fact not noticed by many people that the nation which boasts, and rightly boasts, that it has no established church, but that all creeds are equally recognised in its dominions, began its career by protesting against allowing the French-Canadians to use their own religion in Quebec, that "blood-thirsty, idolatrous and hypocritical creed."

[12] Except the law of real estate which in countries under the Common Law of England is a "rubbish heap which has been accumulating for hundreds of years and . . . is . . .

based upon feudal doctrines which no one (except professors in law schools) understands," law is generally based on common sense and justice—and most of the laws of all civilised countries are very close to each other.

[13] The Quebec Act, 14 George III, c. 83, provided "that no Person, professing the Religion of the Church of *Rome* and residing in the said Province shall be obliged to take the oath required by the . . . Statute passed in the First Year of the Reign of Queen *Elizabeth* (*i.e.*, the Oath of Supremacy) . . . but that every such person . . . shall be obliged . . . to take and subscribe" an oath of which the form is given not objectionable to Roman Catholics. It was in Canada that first in British territory since the Reformation Roman Catholics were allowed to sit as legislators.

[14] The main lines of immigration were toward Cornwall and Kingston on the St. Lawrence, Niagara across the Niagara River and to the left bank of the River Detroit. Of course a great many came to the southern part of what is now the Province of Quebec, particularly to St. John and the "Eastern Townships."

[15] (1791) 31 George III, c. 31. See for the full text the Archives Report already mentioned, pp. 694 *sqq.*

[16] This is not strictly correct—speaking with strict legal accuracy the division of the Province of Quebec into two provinces, *i.e.*, Upper Canada and Lower Canada, was effected by the Royal Prerogative. The message sent to Parliament expressing the Royal intention is to be found copied in the Ontario Archives Reports for 1906, p. 158. After the passing of the Quebec Act, an Order in Council was passed August 24, 1791 (Ontario Archives Reports for 1906, pp. 158 *sqq.*), dividing the Province of Quebec into two provinces and under the provisions of section 48 of the Act directing a Royal warrant to authorise "the Governor or Lieutenant-Governor of the Province of Quebec or the person administering the government there, to fix and

declare such day as they shall judge most advisable for the commencement" of the effect of the legislation in the new provinces, not later than December 31, 1791. Lord Dorchester (Sir Guy Carleton) was appointed September 12, 1791, Captain-General and Governor-in-Chief of both provinces and he received a Royal warrant empowering him to fix a day for the legislation becoming effective in the new provinces (see Ontario Archives Reports for 1906, p. 168). In the absence of Dorchester, General Alured Clarke, Lieutenant-Governor of the Province of Quebec, issued, November 18, 1791, a proclamation fixing Monday, December 26, 1791, as the day for the commencement of the said legislature (Ontario Archives Reports for 1906, pp. 169-171). Accordingly, technically and in law, the new province was formed by Order-in-Council, August 24, 1791, but there was no change in administration until December 26, 1791.

[17] There was a very curious provision in the Act of 1791, which might have proved mischievous: Section 6 authorised the Crown to annex to any hereditary title of honour, rank or dignity conferred by Letters Patent under the Great Seal of the Province, an hereditary right of being summoned to the Legislative Council. This right was never exercised and the Canadas fortunately escaped an hereditary second house of Parliament.

[18] When the first Parliament of Upper Canada met at Newark (Niagara-on-the-Lake), Monday, September 17, 1792, His Excellency the Lieutenant-Governor, Colonel John Graves Simcoe, in the Speech from the Throne, said to the members of the Legislative Council and Legislative Assembly (or House of Commons):

"I have summoned you together under the authority of an Act of Parliament of Great Britain passed in the last year and which has established the British Constitution, and also the forms which secure and maintain it in this distant country.

"The wisdom and beneficence of our Most Gracious

Sovereign and the British Parliament have been eminently proved, not only in the imparting to us the same form of Government, but also in securing the benefit of the many provisions that guard this memorable Act; so that the blessings of our invaluable constitution thus protected and amplified we may hope will be extended to the remotest posterity . . ."

Both Houses made a most loyal address in answer, that of the Council following closely the wording of the Speech from the Throne.

In his Speech from the Throne closing this Session, Simcoe said that the Constitution of the Province was "the very image and transcript of that of Great Britain."

(The Speech from the Throne and the Answers will be found in the Seventh Report of the Bureau of Archives, Ontario, 1910, pp. 1-3; Sixth Report of the Bureau of Archives, Ontario, pp. 2-3. The closing speech is on pages 11 and 18 respectively.)

From the very beginning of the two Provinces of Canada it was contended that the Constitution was the "very image and transcript" of that of Great Britain, and most of the conflicts between Governors and Parliament, and between the two Houses of Parliament arose from the contention that the British Constitution was not followed in the government of the Canadas.

The Union Act was (1840) 3 & 4 Vic., c. 35 (Imp.).

[19] The intense conservatism—I am not using "conservatism" in the political sense—of the average Home Minister or official may not be considered strange when we see even Gibbon, the learned historian, using such language as this:

"If you begin to improve the constitution you may be driven step by step from the disfranchisement of Old Sarum to the King in Newgate, the Lords voted useless, the Bishops abolished and a House of Commons *sans culottes*." Old Sarum was, you remember, a field, which had sent members to the House of Commons in early times

when it was a city, and continued to do so when there were no persons living there at all. The House of Lords has, indeed, been in our own day at length, almost voted useless, and as for the House of Commons, there is no member there now in knee breeches, they are all found with long trousers, and so are "sans culottes" in very fact.

Even greater men (perhaps) were subject to the same horrifying fears, for we may notice the predictions of Robert Southey. He was a poet and a man of great capacity. They were collected long ago by Mr. Phillips of *The Times*. In 1803 Southey proclaimed that "the Protestant Dissenters will die away. Destroy the test and you kill them." But it was the overthrow of Monarchy which was always in his view. "The more I see, the more I read, and the more I reflect," he writes in 1813, "the more reason there appears to me to fear that our turn of revolution is hastening on." In 1815 he writes: "The foundations of Government are undermined. The props may last during your lifetime and mine, but I cannot conceal from myself a conviction that at no very distant day the whole fabric must fall." In 1816 he writes: "The only remedy (if even that be not too late) is to check the press." In 1820: "There is an infernal spirit abroad, and crushed it must be. The question is whether it will be cut short in its course or suffered to spend itself like a fever. In the latter case we shall go on, through a bloodier revolution than that of France to an iron military Government." In 1823: "The repeal of the Test Act will be demanded, and must be granted. The Dissenters will get into the corporations. (That was at the time it was suggested that a man who did not happen to belong to the Church of England might possibly not be a bad member of Parliament. The idea that a Baptist, a Unitarian, or an Anything-arian, should be allowed to be a member of a municipal corporation, was thought to be a terrible thing in those days.) Church property will be attacked in Parliament. Reform in

Parliament will be carried; and then—FAREWELL, A LONG FAREWELL, TO ALL OUR GREATNESS." When the Catholic Relief Bill passed, he prophesied the results: "The Protestant flag will be struck, the enemy will march in with flying colours, the Irish Church will be despoiled, the Irish Protestants will lose heart, and great numbers will emigrate, flying while they can from the wrath to come." In 1832 it was proposed to pass the Reform Bill—"The direct consequence of Parliamentary reform must be a new disposal of Church property, and an equitable adjustment with the fund-holders—terms which in both cases mean spoliation." He was disposed to pray that "the cholera morbus may be sent us as a lighter plague than that which we have chosen for ourselves." The King threatens to make Peers! This also was suggested but the other day. "Nothing then remains for us but to await the course of revolution. I shall not live to see what sort of edifice will be constructed out of the ruins, but I shall go to rest in the sure confidence that God will provide as is best for His Church and people." Later on, in 1838, he writes: "I am not without strong apprehensions that before this year passes away London will have its Three Days." And so forth, and so forth. Robert Southey had not a keen sense of humour.

[20] The "Clear Grit," Liberal or Reform Party.

[21] This had been recommended long before by Chief Justice William Smith (a graduate of Yale) and by the well-known agitator Robert Fleming Gouray—no doubt also by others.

[22] The Honourable George Brown of the *Toronto Globe* was the leader of the "Clear Grit" Party and second to Macdonald only (if to him) in personal influence.

[23] (1567) 30-31 Vic., c. 3 (Imp.).

[24] An incident in the early history of Prince Edward Island may be of interest to Americans. In 1776 two American armed vessels had been sent to the Gulf to

intercept British ordnance and store-ships. They landed at Charlottetown, without opposition, took the Administrator and some of his civil officers prisoners and with the Great Seal of the Island and such valuable booty as they could lay their hands on, placed them on board ship and took them to New England—the American has always been thorough in all his undertakings. Washington had his headquarters at Cambridge: when the exploit was reported to him, he dismissed the principal officers, saying that they had left undone what they were sent to do and done what they should not have done. He did not accept the maxim, "All is fair in war," and even the carrying off of non-combatant enemies without enslavement did not meet his approval. *O si sic omnia.*

[25] Canadian Act, 33 Vic., c. 3 (May 12, 1870).

[26] Dominion Act (1905), 4 and 5 Edward VII, c. 3 and c. 42.

[27] Perhaps the following chronology may be of value—or at least interesting:

1758 First Legislative Assembly in Nova Scotia;

1759-1760 Conquest of Canada;

1760 Military Rule in Canada;

1763 Formal Cession of Canada and Royal Proclamation;

1769 Prince Edward Island formed into a separate Province, being divided from Nova Scotia;

1773 First Parliament in Prince Edward Island;

1774 The Quebec Act;

1784 First Legislative Assembly in New Brunswick;

1791 Constitutional Act;

1792 First Legislative Assembly in Upper Canada and in Lower Canada;

1832 Legislative Council formed in New Brunswick;

1837-1838 Rebellion in Upper and Lower Canada;

1838 Legislative Council formed in Nova Scotia separate from Executive;

1840 Union Act;

1841 First Canadian Parliament for United Canada;

1848 Responsible Government fully recognised in New Brunswick;

1848 And in Nova Scotia, having been partially recognised in 1840;

1850 Prince Edward Island obtains full Responsible Government;

1858 British Columbia a Crown Colony with Representative Government;

1866 British Columbia and Vancouver Island united as one Colony;

1867 British North America Act;

1870 Province of Manitoba formed;

1870 N. W. Territories organised with a Lieutenant-Governor and small nominated Council;

1871 British Columbia admitted into Dominion;

1873 Prince Edward Island admitted;

1873 Prince Edward Island abolished Legislative Council;

1876 Manitoba abolished Legislative Council;

1888 N. W. Territories receive a Legislative Assembly;

1891 New Brunswick abolished Legislative Council;

1905 Provinces of Alberta and Saskatchewan formed.

The Constitutional History of Canada (using the word "Canada" in its historical sense and not in the present geographical sense) divides itself into seven periods: (1) Before the Conquest, 1759-1760; (2) from the Conquest to the Royal Proclamation of 1763; (3) from that Proclamation to the Quebec Act of 1774; (4) from the Quebec Act to the Constitutional Act of 1791; (5) from the Constitutional Act to the Union of the Canadas in 1841; (6) from the Union of the Canadas to the formation of the Dominion in 1867 under the British North America Act; (7) since the formation of the Dominion.

LECTURE II

THE WRITTEN CONSTITUTION

The word "Constitution" carries with it a different connotation in English and in American usage, and we in Canada follow the English. In our usage, the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be governed: in American usage, the Constitution is a written document containing so many words and letters which authoritatively and without appeal dictates what shall and what shall not be done. With us anything unconstitutional is wrong no matter how legal it may be; with the American people anything unconstitutional is illegal however right it may be—with the Americans anything which is unconstitutional is illegal, with us to say that a measure is unconstitutional rather suggests that it is legal but inadvisable.[1]

This difference of meaning necessarily arose from the fact that the so-called Constitution of England was unwritten,[2] while the United States

began its career by formulating the rules by which it should be governed.

In the ultimate analysis the difference arises from the fact that the Fathers of this Union of States knew how to write; and that having the power, they had that desire to reduce their views to a written form which characterises the philosopher.

In the mother country, the philosophic students of the problems of politics also gave written expression from time to time to their views—but these students differed from those philosophers in that they had no power to cause their writing to be adopted as a binding document. No more profound studies have ever been made in the theory of government and concerning the balance of function of its various departments than those of Englishmen—but Englishmen could give them only as speculations, they had not the power to have their theories adopted by the Nation at large.

The Fathers of this Nation, when they had drawn from English and other sources what they conceived to be the true principles upon which government should be carried on, went further and formulated their theories in a document framed with much skill: and they had the fortune to have that document declared binding not only upon the Nation as it then existed, but also upon the Nation—speaking generally—as it was to be to the end of time.[3]

Canada stands between the two—we inherit the constitutional rules of England and at the same time we have laid down for us in writing much by which we are bound.

Nor is this apparent for the first time in the British North America Act. Leaving aside the periods before 1763 (the French period and the period of the forcible occupation of Canada by the British) we find that in the third period (that from the cession of Canada to the coming in force of the Quebec Act, 1774) the Royal Instructions to the Governors give directions in general terms as to what is to be done.

In the Instructions to General James Murray, "Our Captain General and Governor in Chief in and over Our Province of Quebec in America and of all Our Territories dependent thereupon—Given at Our Court at St. James the seventh day of December, 1763,"[4] he is directed to nominate and establish a Council to assist him in the administration of government, to be composed of the Lieutenant-Governors of Montreal and of Three Rivers, the Chief Justice of the Province, the Surveyor-General of Customs (all of whom were appointed by the Home Government) and eight other persons to be chosen by Murray from amongst the "most considerable of the Inhabitants of or Persons of Property in our said

Province." He was also directed to summon a General Assembly of the Freeholders of the Province, as soon as the more pressing affairs of government would allow him to pay attention to this important object (we have seen that this was not in fact done). In the meantime he was instructed to make such Rules and Regulations, by the advice of the Council, as should appear to be necessary for the peace, order and good government of the Province but not tending to affect the life, limb or liberty of the subject or to the imposing of any duty or tax. Explicit instructions were given as to the form of the "Laws, Statutes and Ordinances to be passed," *e.g.*, each different matter must be provided for by a different law, no clause inserted foreign to the title, no perpetual clause in a temporary law, no alteration, repeal, etc., by general words.

All laws, statutes and ordinances were to be transmitted to the Home Government: and none affecting the Commerce or Shipping of the Kingdom or the Prerogatives of the Crown or the property of British subjects was to be approved by the Governor until His Majesty's pleasure should be known.

The Assembly was not to be permitted to arrogate privileges to which it was not entitled; its members were not to be protected against suits

at law during their term of office;[5] it was not to adjourn except *de die in diem*, and was not to assume the sole framing of money bills refusing to allow the Council to alter or amend the same.[6]

The Governor was "not to admit of any Ecclesiastical jurisdiction of the See of Rome or any other foreign Ecclesiastical Jurisdiction whatsoever in the Province": but was to establish the Church of England. The extent and conditions of grants of land were specified, purchases of land by individuals from Indians forbidden and many other specific provisions made.[7]

The Quebec Act of 1774 assured to Roman Catholics the free exercise of their religion and relieved Roman Catholic officials from taking the Oath of Supremacy: it continued the English criminal law subject to such alterations and amendments as the Governor by and with the advice and consent of the Legislative Council should cause to be made, but provided that in "all matters of controversy relative to property and civil rights"[8] resort should be had to the former French laws of Canada until they should be varied or altered by ordinances passed by the Governor by and with the advice of the Legislative Council.

The Act[9] further provided that no ordinance should be passed unless a majority of the Council

should be present (with an exception in cases of emergency between January 1 and May 1). During the currency of this Act, the government was the same as it had been in fact during the preceding period by the Governor and his Council, but the Council was now to consist of such persons resident in the Province not less in number than seventeen or more than twenty-three as His Majesty should appoint under His Signet or Sign Manual.

By the Act of 1791, as we have seen, the two Provinces were to have separate legislatures,[10] each to consist of two Houses, the Legislative Council and the Legislative Assembly.

Members of the Legislative Council were to be summoned by the Governor or Lieutenant-Governor under the Great Seal of the Province, not fewer than seven for Upper or than fifteen for Lower Canada and "a sufficient number of discreet and proper persons."

A curious provision (never acted upon) was contained in this Act, *viz.*, that whenever the King should confer any hereditary title of honour upon any subject, he might annex thereto a hereditary right to a seat in the Legislative Council—this was of course by analogy with the House of Lords.[11]

The Assembly was to consist of a number of

persons elected by the people, the constituencies and the number of representatives to be fixed by the Governor or Lieutenant-Governor in the first instance, the whole number in Upper Canada to be not less than sixteen and in Lower Canada not less than fifty. The electorate was to consist of British subjects over twenty-one years of age with certain property qualification. But the number, constituencies, etc., could be at any time altered by the Provincial Parliament.

The Council and Assembly were to be called together at least once in every twelve calendar months and the Assembly was to continue for four years and no longer, but subject to dissolution at any time by the Governor or Lieutenant-Governor; the Legislative Council was permanent, the members of that body being appointed for life; the Speaker of the Council was appointed by the Governor or Lieutenant-Governor in analogy with the Lord Chancellor (or Lord Keeper), the Speaker of the House of Lords; the Assembly elected its own Speaker as did the House of Commons at Westminster. Any Act of the Legislature might be reserved for His Majesty's pleasure; the Governor or Lieutenant-Governor might also withhold His Majesty's consent to any Act. The King might also disallow any Bill to which his assent had been given in the Province

within two years of the time at which it was received at Westminster.

Full power was given to repeal or vary any existing law—so that full legislative power was entrusted to the local legislatures, subject to the approval of the Governor[12] and to the right of the King (*i.e.*, the Home Administration) to disallow any statute within two years of its receipt.

It will be seen that the main features of this "Constitution" followed the lines of the traditional form of government in England, and indeed the first Lieutenant-Governor of Upper Canada explicitly stated in his address dismissing the legislators at the close of the first Parliament that the Province had been given a Constitution "the very image and transcript of that of Great Britain." So far as legislative power was concerned that was true, but the responsibility of the Ministers of the Crown to the popular body was not provided for.

While there was a clear intention that an Executive Council should be formed in each Province, there was no provision for the manner in which it was to be constituted, what its duties should be, etc., and in the absence of express provision, disputes arose. An Executive Council was in fact appointed at the beginning of Upper (as well as Lower) Canada's separate existence

and the institution was continued without interruption.

In the two Provinces, the House of Assembly claimed the rights and privileges of the British House of Commons and (speaking generally) had the claim allowed; the Legislative Council corresponded to the House of Lords; there was nothing in the formal Constitution of England to which the Executive Council could correspond but the Privy Council; and nothing in the informal Constitution but the Cabinet.

At the present time[13] there is little difficulty in determining the relative functions and powers of the Crown, the Houses of Parliament, and the "Ministry"; but in 1792 the task was not so easy.

At the Common Law and before the Commonwealth, the King did not only reign, he also governed. He was master in theory; and in practice he was as much and as far master as his subjects would permit without successful armed opposition. The Revolution changed both theory and practice; thereafter both in theory and in practice, the King must find a Minister who would take upon himself the responsibility of the King's acts.

While this was never forgotten, King George III, in his long reign came perilously near the old practice in some instances; but he never failed

to find a Minister to father any of his acts, however unwise. In every case the King was considered blameless, "the King can do no wrong," and the Minister was the culpable party. That is Responsible Government, *i.e.*, the Minister who is responsible for the advice to the King is responsible to the representatives of the people in Parliament, for giving such advice.

In the Mother Country, these propositions were acknowledged in theory and fairly well observed in practice.

In Canada, there was no resident hereditary head of the State, who could do no wrong. The effective power at the head of affairs was an officer appointed for a short term of years by the King on the advice of the Home Administration, not to reign, but to govern; he had specific instructions as to many of his duties, and was responsible to the authority which appointed him. Unlike the King, he could do wrong; unlike the Home Ministry, he was responsible not to the people or their representatives, but to an authority across the seas. It naturally followed that those whom he appointed to carry on the business of State were responsible to him alone and not to Parliament; their advice he need not seek; if sought and given, it might be neglected, and he

could not hide himself behind any officer or the advice of any officer.

The Constitution of Canada, then, was far from being the image and transcript of that of Great Britain.

In the early days of the Colony, the inhabitants were too much engaged in material matters, in chopping down the forests, in clearing the land and in making a home in the New World, to pay much attention to the theory or indeed to the practice of government. The Governor had Crown Lands to draw upon and other revenues, and did much as he pleased without interference or complaint; Parliament had certain taxes imposed by its own authority and certain customs duties, and this money was expended under the order of Parliament. The money at the disposal of the Governor tended rather to decrease than to increase; that of the Parliament had the reverse tendency; and it was inevitable that at some time the Governor would desire to encroach on the money of Parliament. And if money is not the root of all evil, it is the root of most revolutions and constitutional changes.

After a long agitation largely upon Responsible Government, there was a short-lived Rebellion in each Province, 1837-1838. Lord Durham made

an investigation and report which resulted in the Union Act of 1840.[14]

This provided for the union of the two Provinces, for one Legislative Council and one Assembly with power "within the Province of Canada . . . to make laws for the peace, welfare and good government of the Province of Canada." Legislative Councillors not fewer in number than twenty were to be appointed for life by the Governor under the Great Seal of the Province. (In 1856, provision was made by the Canadian Statute, 19-20 Vic., c. 140, for Legislative Councillors being elected, so that thereafter there were two elected Chambers as in the United States: but this produced no real change in the working Constitution except somewhat to increase the importance of the Legislative Council.) The Governor also was to appoint the Speaker of the Council. In the Assembly an equal number of representatives was to come from each part, formerly Upper Canada and Lower Canada. Constituencies were laid out with power reserved to the Canadian Parliament to change constituencies, alter the apportionment, etc. (the apportionment not to be altered without a two-thirds vote in each House). The Governor had still the right to withhold the Royal assent and to reserve any Bill for Her Majesty's pleasure and the

Queen might disallow any Bill to which the Governor had given his consent within two years of its receipt at Westminster.

The most important change that was made was to surrender the hereditary revenues of the Crown for a fixed sum of £45,000 to pay the Governor's and Judges' salaries and another of £30,000 to pay certain other officials. The result was necessarily to take from the Governor the means of defraying the expenses of government, and thereby to force him to apply to Parliament for money—the purse-strings were held by the Assembly and Responsible Government was the necessary consequence.

But notwithstanding the broad terms of the Act and the benevolent intentions of the Imperial Parliament, full Home Rule could not be expected at that time—accordingly we find it provided[15] "all powers and authorities expressed in this Act to be given to the Governor of the Province of Canada shall be exercised by such Governor in conformity with and subject to such Orders, Instructions and Directions as Her Majesty shall from time to time see fit to make or issue."

But though this provision looks like a formidable diminution of the responsibility of the Ministry to the people of Canada alone, it was not in fact of any consequence, the results were

practically negligible—no British administration ever set itself against the will of Canada as expressed in its Legislature, and for all practical purposes the clause might have been omitted.[16]

It took some time for the Canadas to settle down under the Union Act: but on the whole the Union worked well.

The present written "Constitution" is to be found in the British North America Act of 1867, with the amendments thereto.

The Preamble of the Statute expresses the desire of the Provinces of Canada, Nova Scotia and New Brunswick to be united into one Dominion under the Crown of Great Britain and Ireland "with a constitution similar in principle to that of the United Kingdom," and adds that it is expedient "not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also the nature of the Executive Government therein be declared."

A "Dominion of Canada" was authorised to be composed of four Provinces, Ontario, Quebec, Nova Scotia and New Brunswick, the boundaries of which Provinces were to be the former boundaries of Upper Canada and Lower Canada and the existing boundaries of Nova Scotia and New Brunswick, respectively, with provisions for the admission of Newfoundland, Prince Edward

Island and British Columbia on the Address of the Parliament of the Dominion and of the Parliament of the Colony to be admitted. There was also a provision for the admission of Rupert's Land and the Northwestern Territory or either of them on the Address of the Parliament of the Dominion.

(No power was given to the Dominion to establish new Provinces, but this defect was corrected by "The British North America Act, 1871."[17] The Act empowered the Parliament of Canada to establish new Provinces in any part of the territory of Canada not already in a Province and make provision for the constitution and administration of any such Province.[18] The same Act also provides for the Parliament of Canada with the consent of the Provincial Legislature increasing, diminishing or altering the limits of any Province.)

Passing over the division between Dominion and Provinces of the public property and the adjustment of national debts, we note that the Dominion as a whole was to have one Parliament consisting of the Sovereign, an Upper House called the Senate, and the House of Commons: each of the Provinces was to have a Legislature, in Ontario of one House (the Legislative Assembly), in Quebec of two Houses (the Legislative

Council and the Legislative Assembly) and in Nova Scotia and New Brunswick as they were on the passing of the Act (*i.e.*, with two Houses, the Legislative Council and the Legislative Assembly).

The Provincial Legislatures were given power[19] to amend the Constitution of the Province except as regards the office of Lieutenant-Governor: and New Brunswick has got rid of her Legislative Council.[20]

Nova Scotia and Quebec retain their Legislative Council and still have the bicameral system.[21]

Manitoba was organised in 1870[22] with two Chambers but she early got rid of the Legislative Council.[23]

Prince Edward Island began in 1773 with an elective Assembly and an appointed Council: in 1862, the Council was made elective also, and in 1893, the Council and the Assembly were combined so as to form but one House—for each of the fifteen constituencies there were to be and are elected one Councillor and one Assemblyman by voters of different qualifications; but all Councillors and Assemblymen sit and vote together. (This will remind the student of Parliamentary History of the ancient Scottish Parliament.)

Prince Edward Island came into Confederation with only one House.

British Columbia had one House called the Legislative Council. She, in anticipation of being admitted into the Dominion, changed the name of her Chamber to Legislative Assembly.[24]

When the Provinces of Alberta and Saskatchewan were created by the Dominion[25] in 1905, it was provided that the Legislature should have only one Chamber called the Legislative Assembly.

The Yukon Territory has a "Territorial Council" substantially the same as the Legislative Assembly of the organised Provinces—the North West Territories, comprising all British territories in this part of North America and all islands adjacent thereto not included in any Province or the Yukon Territory or Newfoundland and its dependencies, has not as yet any Legislature.

While only two of the nine Provinces have now two Houses, the Dominion retains the old system, having still her Senate and House of Commons.

The Senate had originally seventy-two members, twenty-four from Ontario, twenty-four from Quebec, twelve from Nova Scotia and twelve from New Brunswick. The number from Ontario and Quebec remains the same but after Prince Edward Island was admitted into the Dominion, Nova Scotia and New Brunswick each lost two Senators and the four Senators were allotted to the new Province: Manitoba has four, British Columbia

three, and Alberta and Saskatchewan each four, making eighty-seven in all.[26]

The Senator is appointed for life with power to resign, and losing his seat if he fails for two consecutive sessions to give his attendance in the Senate, becomes bankrupt, etc. Modest qualifications are prescribed.[27]

Power is reserved to the Sovereign on the recommendation of the Governor-General to direct that three or six members be added to the Senate from the three divisions of Canada equally;[28] but if this be done there are to be no more appointments until the Senate has its normal number of members.[29]

The Speaker is appointed by the Government of the day: he has a vote and in case of equality of votes, the question passes in the negative.

The House of Commons is elected by the people, the franchise being fixed by the Canadian Parliament, and the representation is proportionate to the population.

The original number of members from each Province was fixed by the British North America Act; but thereafter the method prescribed was as follows: A census is taken decennially; Quebec is given her fixed quota of sixty-five members and the other Provinces are assigned a number of members which will bear the same ratio to sixty-

five as its population bears to the population of Quebec.[30]

In the Provinces, members of the Legislative Council (where such a body exists) are nominated by the Government of the Province, the Dominion having no authority in the premises; their tenure of office is for life. The Speaker of this House is appointed by the Local Government: and he has the same powers as to voting, etc., as the Speaker of the Senate.

The Legislative Assemblies are elected by the people on a franchise and with constituencies fixed by the Local Legislature, and the number of representatives is also so fixed.

Every House of Commons has a life of five years only[31] and is subject to be sooner dissolved by the Governor-General; each Legislative Assembly has a life of four years only subject to being sooner dissolved by the Lieutenant-Governor; in no case is a period of twelve months to intervene between the last sitting of Parliament or Legislature and its first sitting in the next session.

We now come to functionaries whose office on paper is exceedingly important—the Executive Government in Canada being in the Sovereign, he appoints an officer known as the Governor-General as the chief executive officer for carrying on the

government in Canada on behalf and in the name of the Sovereign: he has a Privy Council (but it is His Majesty's Privy Council for Canada) to aid and advise the government.

In the Provinces there is an officer called the Lieutenant-Governor appointed by the Governor-General in Council at Ottawa during pleasure, but he cannot be removed within five years of his appointment except for cause assigned; his salary is paid by the Dominion and he has an Executive Council.[32]

Money bills must originate in the House of Commons and no appropriation or tax can be voted for any purpose that has not first been recommended to the House by message of the Governor-General in that session—in the Legislative Assemblies it is of course the Lieutenant-Governor who must recommend.

The Legislative power is divided between Dominion and Provinces, all classes of subjects not specifically assigned to the Provinces falling to the Dominion.

The Provincial Legislatures deal with local affairs and "generally all matters of a merely local or private nature within the Province"—Section 92 enumerates the subjects of Provincial legislation while the preceding section enumerates the subjects of Dominion legislation.[33]

Where a bill has been passed by the Houses of Parliament and is presented to the Governor-General, he may (1) assent to it in His Majesty's name; (2) withhold His Majesty's assent, or (3) reserve the bill for the King's pleasure—if he gives assent, the bill may be disallowed by the King in Council, *i.e.*, the Home Administration, within two years of its receipt—if the bill is reserved it has no force unless within two years the Governor-General sends a message to Parliament that it has received His Majesty's assent.

The Lieutenant-Governor has the same power in local legislation but he reserves, etc., for the Governor-General in Council and the disallowance of any bill assented to must be made by the Governor-General in Council within one year.

No Province may legislate prejudicially affecting any right or privilege with respect to denominational schools which any class of persons had by law at the time of the Union—the rights of minorities in respect of separate schools are strictly guarded.[34]

All judges are appointed by the Dominion from the Bar of the respective Provinces (Courts of Probate in Nova Scotia and New Brunswick, and Surrogate Courts of Probate in Ontario are excepted).[35]

The Dominion pays annually to the Provinces a fixed sum for the support of the local Governments: of course the local Governments have also their own sources of revenue.

NOTES TO LECTURE II

[1] See my judgment in Bell *v.* Burlington (1915), 34 O. L. R., 619 at p. 622 (Appellate Division of the Supreme Court of Ontario).

For example, in theory the Sovereign has the right to refuse to assent to a bill which has passed both Houses of Parliament. No Sovereign since Queen Anne has ventured to do this—and the theoretical right is dead as Queen Anne herself. No Sovereign would now dream of setting up his will against that of his Parliament—to do so would be unconstitutional. But there are many parts of the Constitution by no means so well settled. If ten years ago, a statesman or lawyer had been asked whether the House of Lords could reject a budget passed by the Commons, he would have answered, "The House of Lords no doubt can, but it will not." And yet we know the House of Lords did that very thing—with the result we know.

[2] The recent legislation whereby the House of Commons was enabled to make law without the assent of the House of Lords has introduced a modification of this statement—the "Constitution" of the Mother Country is now in part written.

[3] The quotation is from an Address delivered by myself before the Iowa State Bar Association at Cedar Rapids, Iowa, June 28, 1912. Prof. Hugo Münsterberg says, "the American people is in its thought conservative to the last degree." "The Americans," London edition, Williams & Norgate, 1916, at p. 217 *ad init.*

[4] The full text of these Instructions will be found in Shortt & Doughty, pp. 132 *sqq.*

[5] The privilege of exemption from arrest on civil process

enjoyed by the members of the House of Commons at Westminster was very highly prized. It was claimed and effectively asserted by the first House of Parliament of Upper Canada during its second session in 1793. We find on Monday, June 17, this resolution carried: "That the Speaker do inform W. B. Sheehan, Esquire, Sheriff of this district, that the House entertain a strong sense of the impropriety of his conduct towards a member of this House in having served a Writ of Capias upon the said member contrary to his privilege, and that the House has only dispensed with the necessity of bringing him to their bar to be further dealt with from a conviction that want of reflection and not contempt made him guilty of an infringement upon the privileges of the House."

That the members of the Upper Canada House had the same privilege from arrest as a member of the Imperial House of Commons is certain—and that, not only during the sittings of the House, but for forty days before and forty days after is clear from Reg. *v.* Gamble and Boulton (1832), 9 U. C. R. 546, and several other cases down to Cox *v.* Prior (1899), 18 P. R. 492.

Accordingly the sheriff had reason to consider himself lucky in escaping the fate of others who had been guilty of somewhat similar acts.

Upon the first day of the first Parliament of James I in 1603, a complaint was made that Sir Thomas Shirley, who had been elected a member of the House of Commons, was arrested four days before the sitting of the Parliament and imprisoned in the Fleet. A writ of Habeas Corpus was issued and he was discharged. Precedents were looked into and the plaintiff at whose suit and the sergeant by whom the arrest was made were sent to the Tower. The Warden of the Fleet, who had persisted in refusing to obey the writ of Habeas Corpus and deliver up his prisoner, was ordered to be committed "to the place called the Dungeon or Little-Ease in the Tower." Afterwards "delivering his

prisoner" and "upon his knees confessing his error and presumption and professing he was unfeignedly sorry, the Speaker pronounced his pardon and discharge, paying ordinary fees to the clerk and the sergeant." In February, 1606, an attorney who had procured the arrest of Mr. James, a member of the House of Commons, and the officer who had arrested him, were "for their contempt committed to the custody of the sergeant for a month, which judgment was pronounced against them kneeling at the bar, by Mr. Speaker."

The episode in Upper Canada, however, was after the Constitutional Act of 1791, and that was after Bunker Hill; and the view taken in England of the rights of Colonists had been seriously and beneficially modified. See a series of articles, "Some Early Legislation and Legislation in Upper Canada" in the *Canadian Law Times* for 1913: 33 Can. L. T., pp. *22*, 96, 180.

[6] In short, the House of Assembly was not to be a duplicate of the Imperial House of Commons. We have seen that the Canadian Houses of Assembly did later assert their status to be that of the House of Commons.

[7] The Instructions to Sir Guy Carleton (1768) will be found in Shortt & Doughty, pp. *210 sqq.* The tenor is much the same.

[8] Particular attention should be paid to this expression, "property and civil rights," now appearing for the first time but continued in the legislation till the present time. These words have been the cause of endless discussion and litigation.

[9] This Act (1774), 14 George III, c. 83, is printed in full in Shortt & Doughty, pp. 401 *sqq.*

[10] This Act (1791), 31 George III, c. 31, is printed in full in Shortt & Doughty, pp. 649 *sqq.* It is well known to have caused the historical and fateful rupture between Burke and Fox. I add here a synopsis of its provisions:

Sec. 1 repeals much of the Quebec Act (1774), 14 George III, cap. 83.

Sec. 2 provides for a Legislative Council and an Assembly in each of the Provinces of Upper Canada and Lower Canada, with power to pass legislation valid when assented to by the Sovereign or the Governor or Lieutenant-Governor appointed by the Sovereign.

(Sections 3 to 12, inclusive, contain the provisions as to the Legislative Council.)

Sec. 3 gives power to the Sovereign to direct by Sign Manual the Governor, etc., to summon to the Legislative Council such persons not less than seven or more than fifteen as should be selected by the Sovereign.

Sec. 4 provides that no one shall be summoned to the Legislative Council under twenty-one years of age or not a British subject by birth, naturalisation or conquest.

Sec. 5 makes the position of Legislative Councillor for life, subject to vacation in cases thereafter mentioned.

Sec. 6 empowers the Sovereign to annex to any hereditary title of honour in the Province, the hereditary right to sit in the Legislative Council. (This was, of course, by analogy to the House of Lords in the mother country; the power has never been exercised.)

Sec. 7 provides for forfeiture of this hereditary right.

Sec. 8—For loss of seat in the Legislative Council in certain specified cases.

Sec. 9 protects hereditary rights in certain cases of loss of seat.

Sec. 10 declares all seats and all heredity forfeited for treason.

Sec. 11 provides for determining contested rights to seats.

Sec. 12—The Governor, etc., is to appoint the Speaker.

(Sections 13 to 25, inclusive, contain the provisions as to the Legislative Assembly.)

Sec. 13 empowers the Sovereign to direct the Governor, etc., to call together an Assembly.

Sec. 14—And to divide the Province into Ridings, appoint Returning Officers, etc., for an Election.

Sec. 15—The R.O.'s to hold office for not more than two years from the commencement of the Act.

Sec. 16—No one to be compelled to be R.O. more than once.

Sec. 17—The whole number of representatives not to be less than sixteen in Upper Canada or less than fifty in Lower Canada.

Secs. 18 and 19 prescribe the Writs for Election and the Return.

Sec. 20—The electorate to consist of those owning land worth not less than 40s. (Sterling) per annum in country districts; in towns £5 (Sterling), or paying rent not less than £10 (Sterling).

Sec. 21 prohibits Ministers, Priests, Ecclesiastics and Teachers of any Church, or form of religious faith or worship from sitting in the Assembly. (This provision afterwards proved troublesome to the Methodists—some of their local preachers were compelled to vacate the seats in the Assembly to which they had been elected.)

Sec. 22—None under twenty-one or not a British subject to be allowed to vote or be elected.

Sec. 23—And no one attainted of treason or felony.

Sec. 24—An oath for voters is provided.

Sec. 25—Eight days' notice of the time of election to be given.

Sec. 26—And due notice of the sitting of Parliament.

Sec. 27—Parliament to be called together at least once every twelve months.

Sec. 28—All questions to be decided by a majority of votes, the Speaker of Council or Assembly to have a casting voice.

Sec. 29—Oath for members of Council and Assembly.

Sec. 30—The Governor, etc., authorised to withhold assent to legislation or to reserve for His Majesty's consideration.

Sec. 31—The Governor, etc., to transmit to the Secretary of State all Bills assented to; these may be disallowed by His Majesty in Council any time within two years of their receipt.

Sec. 32—Bills reserved for His Majesty's pleasure not to have any effect until approval communicated to Council and Assembly.

Sec. 33—Laws in force at the passing of the Act to continue in force until repealed.

Sec. 34—The Governor, etc., "with such Executive Council as shall be appointed by His Majesty for the affairs of such Province" to be a Court of Appeal. (This, curiously enough, is the only mention of an Executive Council in the Act except in Secs. 38 and 50. Troubles over the Executive Council, its functions, power and responsibility soon developed and continued till after the Rebellion of 1837.)

Sec. 35—Certain previous regulations, etc., in respect of the Roman Catholic clergy to continue in force.

Secs. 36 and 37—For the support, etc., "of a Protestant Clergy," land to be allotted "equal in value to the seventh part" of lands "granted by and under the authority of His Majesty."

(The celebrated Clergy Reserves of one-eighth of the ungranted lands of the Crown, not one-seventh, as ordinarily supposed, since the Reserve was to be one-seventh of the land granted, *i.e.*, one-eighth of the whole. What was "a Protestant Clergy" was soon in dispute. The Church of England claimed a monopoly of the title, but on the advice of the Law Officers of the Home Government, the Church of Scotland had its claim allowed as being an Established Church, and as Protestant as the Church of England. Other and Nonconformist Presbyterians, Methodists, and some other religious bodies which believed themselves to be

Protestant Churches and to have a Protestant Clergy then advanced claims, which were more or less assented to. At length, after being for years a constant source of irritation and contention, the "Clergy Reserves" remaining were applied to education purposes.)

Sec. 38—The Governor, with the advice of the Executive Council, might erect Parsonages and endow them for the Church of England.

Sec. 39—And appoint incumbents.

Sec. 40—Subject to the rights of institution, etc., of the Bishop of Nova Scotia.

Sec. 41—The provisions of Secs. 36 to 40, inclusive, to be subject to repeal or variation by the Provincial Parliament.

Sec. 42—Certain Acts to be laid before the Imperial Parliament before receiving the Royal Assent.

Sec. 43—Land in Upper Canada to be granted in free and common soccage.

Sec. 44—Existing grantees there may surrender their grants and receive new ones in free and common soccage.

Sec. 45—These new grants not to bar any existing right.

Sec. 46—The Imperial Parliament not to levy any tax, etc., except for the regulation of navigation, etc.

Sec. 47—All taxes levied for navigation, etc., to be applied to the use of the Province.

Sec. 48—Act to begin not later than December 31, 1791.

Sec. 49—Provincial Elections not later than December 31, 1792.

Sec. 50—In the interim, Governor and Executive Council may make temporary laws, regulations, etc.

[11] Very few hereditary titles of honour have been conferred upon Canadians, some five Peerages, Lords Strathcona, Mount Stephen, Shaughnessy, Beaverbrook and now Graham, and a dozen or so of baronetcies—none of the peerages and but a few of the baronetcies were created till after the Act of 1791 had been repealed and in no case was

there attached thereto the right to sit in the Legislative Council. The usual Imperial honour granted to Canadians is a Knighthood, whether as Knight Bachelor or Knight of one of the Orders; this is not hereditary but is confined to the original donee. Where a baronetcy is given it is generally (although not universally) given to one without issue and without probability of issue.

[12] There was a Governor-in-Chief of all Canada and a Lieutenant-Governor for each Province. The Lieutenant-Governor had all the powers of the Governor-in-Chief (speaking generally) during the absence from the Province of the Governor-in-Chief; during his presence, the Lieutenant-Governor had no official functions.

[13] I mean in times of peace; there is a certain dislocation of the normal constitution at this time of war.

[14] (1840), 3 and 4 Vic., c. 35 (Imp.). The continued agitation for Responsible Government shows that the Canadian like the rest of the British world and the American, will consent to the rule of an oligarchy only so long as the few owe their power to the vote of the many.

[15] By section 59.

[16] Such provisions are a survival of what were once living realities, now atrophied for want of use: they do no harm and are therefore tolerated just as the official title of His Majesty which makes him King by the Grace of God when everyone knows he is King by grace of an Act of Parliament. He is quite too sensible to make a claim of Divine Right—he may even be (like his grandmother, Queen Victoria) a Jacobite but he will not abdicate for that reason.

[17] (1871), 34 Vic., c. 28 (Imp.), coming into force June 29, 1871.

[18] It was under the powers given by this Act that the Provinces of Manitoba, Saskatchewan and Alberta were formed.

[19] By section 92 (1).

[20] By the New Brunswick Statute of 1891, 54 Vic., c. 9 (N. B.), passed April 16, 1891, and to become effective after the closing of the first session of the Legislature holden in 1894 or at the dissolution of the existing Legislature—in fact, the Legislature ceased to exist and a new Legislature was elected so that after April, 1892, there was no legislation "by the Lieutenant-Governor, Legislative Council and Assembly," but the new Legislature (in 1893) had only one House and the legislation thereafter was "by the Lieutenant-Governor and Legislative Assembly."

[21] There have been several attempts to abolish the Second Chamber in Nova Scotia and (it is said) more than once gentlemen appointed to the Council under a pledge to vote for its abolition have developed conscientious scruples against keeping the promise, as it is unconstitutional to pledge oneself in advance to vote in any particular way. Members of other Second Chambers have been known to discover constitutional obstacles against their voting in the way they did not wish to vote.

[22] By the Dominion Act (1870), 33 Vic., c. 3 (Dom.).

[23] The Act of 1870 gave Manitoba a Legislative Council of seven members but it disappears after the session of 1876 (the second session of the Second Parliament)—it was abolished by the Manitoba Act, 39 Vic., c. 28.

[24] See the Laws of British Columbia for 1871 (34 Vic.), No. 147.

[25] (1905), 4 and 5 Edward VII, cc. 3 and 42.

[26] Pursuant to an Address from the Parliament of Canada, the British North America Act, 1867, was amended in 1915 by the Imperial Statute, 5 and 6 George V, c. 45, fixing the number of Senators at 96—from Ontario, 24; from Quebec, 24; from Nova Scotia, 10; from New Brunswick, 10; from Prince Edward Island, 4; from Manitoba, 6; from British Columbia, 6; from Saskatchewan, 6; and from Alberta, 6—96 in all. This provision, however,

does not come into force until the termination of the existing Canadian Parliament.

[27] The qualifications are prescribed by section 23:

"23. The qualifications of a Senator shall be as follows:

"(1.) He shall be of the full age of thirty years:

"(2.) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalised by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union.

"(3.) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in francaleu or in roture, within the Province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same:

"(4.) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities:

"(5.) He shall be resident in the Province for which he is appointed:

"(6.) In the case of Quebec he shall have his real property qualification in the Electoral Division for which he is appointed, or shall be resident in that Division."

[28] After the present Canadian Parliament these numbers will be four and eight respectively, representing equally (1) Ontario, (2) Quebec, (3) the Maritime Provinces and (4) the Western Provinces.

[29] Originally the number of Senators was restricted to 78. Changes have been made from time to time and after

the present Canadian Parliament the maximum will be 104, 26 from each division (5 and 6 George V, c. 45, s. I, 1, v, Imp.).

[30] After the present Canadian Parliament the number of members of Parliament from any Province must not be less than the number of Senators to which it is entitled (5 and 6 George V, c. 45, s. 2 Imp.). This change was made by reason of the complaint of Prince Edward Island that her representation in the Commons was reduced to three members on the readjustment of 1914 following the preceding census, although her Senators remained four in number.

[31] At the request of the two Houses of the Canadian Parliament, the Imperial Parliament has extended the life of the present Canadian Parliament for an extra year—this was to avoid the necessity of a war-time election.

[32] A curious "Constitutional" point has been mooted, *viz.*, is the King part of the Local Legislatures?

The British North America Act, 1867, makes the Parliament of Canada consist of the Queen, the Senate and the House of Commons (sec. 17); but when it comes to define the Legislature of the Province we find it "consisting of the Lieutenant-Governor and of one House" (or two Houses in the case of Quebec). It has been questioned whether the King is part of the Provincial Legislature—indeed, New Brunswick and Prince Edward Island have their Statutes read "Be it enacted by the Lieutenant-Governor and Legislative Assembly as follows," etc. Ontario, Manitoba, British Columbia, Alberta and Saskatchewan use the terminology, "His Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario (or as the case may be) enacts as follows," etc. Quebec and Nova Scotia use the same terminology but add the Legislative Council.

The point is of no practical importance—the Lieutenant-Governor represents the King in his Province.

[33] Sections 91 and 92 read as follows:

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:

1. The Public Debt and Property.
2. The regulation of Trade and Commerce.
3. The raising of money by any mode or system of Taxation.
4. The borrowing of money on the public credit.
5. Postal service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the establishment and maintenance of Marine Hospitals.
12. Sea coast and inland Fisheries.
13. Ferries between a Province and any British or Foreign country or between two Provinces.
14. Currency and Coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings' Banks.
17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal tender.

21. Bankruptcy and Insolvency.

22. Patents of invention and discovery.

23. Copyrights.

24. Indians, and lands reserved for the Indians.

25. Naturalisation and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces. And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes.

3. The borrowing of money on the sole credit of the Province.

4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the timber and wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, local, or municipal purposes.

10. Local Works and Undertakings other than such as are of the following classes,—

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province:

b. Lines of Steam Ships between the Province and any British or Foreign Country:

c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

11. The Incorporation of Companies with Provincial objects.

12. The Solemnisation of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The imposition of punishment by fine, penalty, or

imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

16. Generally all matters of a merely local or private nature in the Province.

[34] The Roman Catholic minority in Ontario and the Protestant minority in Quebec had the right to Separate or Denominational Schools—the Provinces were forbidden to take away or prejudicially affect these rights.

[35] Although all Judges are appointed by the Dominion, the constitution of the Courts (including Courts of Criminal Jurisdiction) lies with the Province—the Province may erect, abolish or modify any Court, civil or criminal. Justices of the Peace are appointed by the Local Administration but they do not try civil actions: every civil dispute of however small dimensions must in our system be tried by a Barrister of some years' standing at his Bar and appointed for life.

LECTURE III

THE CONSTITUTION IN ITS ACTUAL WORKING

THE written Constitution as it has been displayed in the last Lecture would seem wholly to justify the pity and sympathy so freely shown us by some of our friends south of the International line.[1]

A King across the sea ruling by the Grace of God and with power not only to appoint the Governor-General but also to disallow any legislation the Dominion Parliament may pass—that Governor-General (not responsible to the people of Canada), with power to appoint the whole of one of the Houses of Parliament, to refuse to approve of any legislation he sees fit, to appoint a Privy Council to advise him in the government of the Dominion, to appoint all the Judges and Civil Servants, to dissolve Parliament and while it is in session to direct it as to what it may vote money for—and generally to act the autocrat. Why, Canada could not refuse to pay his salary of £10,000 or even cut it down!

Then in the Provinces, the Lieutenant-Governor himself appointed and removable by the Governor-General, an autocrat in Provincial where the Governor-General is in Dominion matters; and the Legislature holding by the will of the Lieutenant-Governor while ostensibly granted power of legislation in certain matters is subject to have its legislation reviewed and disallowed by the Governor-General at Ottawa.

What an intolerable situation! No citizen of an American State would consent to the appointment of a Governor of his State by Woodrow Wilson; any American would be indignant if the President of the United States were to assume to review and disallow State legislation.

But we are not filled with discontent though we have the same feeling as respects personal freedom and political independence as Americans.

The reason is to be found in the Constitution (using the word in the English sense) which we apply to the Constitution (using the word in the American sense).

The King is a constitutional monarch reigning by virtue of an Act of Parliament, who leaves ruling to those whose constitutional duty it is—the Ministry responsible to the people of the British Isles. That Ministry has long ceased to interfere with Canadian affairs and would not

think of directing or even advising the people of Canada or its Ministry what to do or to leave undone.

Pains are taken that a Governor-General to be appointed is acceptable to the Canadians;[2] and those who are appointed know well what is expected of them.[3]

Like the King, the Governor-General leaves all the ruling in the hands of his Ministry—like the King, he must find a Ministry which will become responsible for his Acts—if it should ever happen that a Governor-General acted on his own responsibility and could not find a Ministry to take the responsibility, he could not remain, his usefulness would be gone.

Accordingly, what is said to be done by the Governor-General is in fact the act of the Ministry, having the confidence for the time being of the House of Commons elected by the people of Canada. *Mutatis mutandis*, the same statements apply to the Lieutenant-Governor.

What is the Ministry? The word does not occur in the British North America Act but every one knows what is meant.

In Canada the Party System is in full vigour[4] and for very many years there have been but two political parties.[5] By a more or less informal method, perhaps a caucus of the Members of

Parliament of the party,[6] a Leader of the Opposition is selected—when in course of time, that party obtains a majority in the House of Commons, the existing Ministry resigns,[7] and the Governor-General sends for the Leader of the Opposition.[8] That gentleman sets out to form a Ministry. All Ministers of the Crown must be members of one of the Houses of Parliament.

If the Leader of the Opposition finds that he cannot obtain Ministers to aid him in his administration of the affairs of the country, he declines the task of forming a Ministry, and another must be sent for—perhaps the former Prime Minister—until some one is procured who can form a Ministry with which he will undertake to carry on the affairs of the country—he is Prime Minister or Premier. He may not be satisfied with the existing House of Commons, in that case he demands and obtains a new election.

Whenever there is a Prime Minister with a majority in the House of Commons, the Government can go on, but not otherwise normally.

To give the people a chance to express an opinion on the merits of any proposed Minister, he must, if a member of the House of Commons, on accepting an office with salary attached, go back for re-election;[9] if a Senator of course he passes no such ordeal.

The difference between the Prime Minister and any other Minister is that when they cannot agree and one must resign, it is that other and not the Prime Minister who does it.

All the Ministers are sworn of the Privy Council, the only body known to the written Constitution.

Most of the Ministers are placed in charge of a Department with a salary attached.[10] Some, however, may be "Ministers without Portfolio" and without salary.

There is a body quite unknown to the written Constitution, *i.e.*, "The Cabinet"; this consists of the Prime Minister and such of the members of the Privy Council as he may choose, in Canada generally all the Ministers—so that, speaking broadly, the Cabinet and the Ministry are the same.[11]

The Privy Council never meets as a body[12] since it contains the members of former administrations—but the Cabinet is considered to consist of such of the Privy Councillors (who are members of Parliament) as best and most efficiently represent the views and policies of the dominant political party, *i.e.*, the party which has a majority in the House of Commons.[13]

It is that part of the Privy Council called the Cabinet which advises His Excellency—His

Excellency in fact signs the papers placed before him. He may advise but he cannot command.

What has been said of the Governor-General applies *mutatis mutandis* to the Lieutenant-Governor.

As has been said, any act ostensibly of either is the act of an Administration responsible to the people's representatives in the popular House.

It may be that the Governor is not satisfied with his Ministry; he may dismiss them, but if he does he must find another Ministry to take the responsibility of his act—there have been no dismissals of this kind in Dominion politics, but there have been instances in the Provincial arena.[14] Moreover, where a Lieutenant-Governor acts in this way he is responsible to the Governor-General and the Governor-General may remove him on the advice of his Ministers, the Dominion Cabinet.

There have been several instances of Lieutenant-Governors compelling Local Administrations to have enquiries made by Royal Commissions; sometimes the investigations so made have been fatal to the Government who either resigned or were defeated at the succeeding election.[15]

But all these are abnormal; nothing of the kind has ever taken place in Ontario (for example)—the normal course is for the Lieutenant-Governor

to take the advice of his Ministers, though enough has been said to show that he is not a mere *roi fainéant*.

Members of the Senate are appointed, in fact, by the Administration and are in all instances members of the dominant political party[16] although they may not have been active politicians.

The provision permitting the Sovereign on the recommendation of the Governor-General to add three or six (hereafter four or eight) persons to the Senate was introduced, of course, to enable a deadlock to be broken—as Peers are created in England. This power has never been exercised, and only once recommended;[17] the Home Government will not interfere in Canadian politics and it recognises that the power is only to be exercised (if ever) when it is absolutely necessary for the purpose of bringing the Senate into accord with the popular House, in the event of an actual collision of a serious and permanent character.

The provision that every bill for appropriating any part of the public revenue or for imposing any tax or import must originate in the House of Commons is, of course, intended to crystallise the constitutional practice at Westminster and to make it plain that the people hold the purse-strings; while that which prevents the House passing any such bill unless it shall first have

been recommended by message from the Governor-General emphasises the responsibility of the Ministry of the day for the expenditure of every dollar of public money.[18]

What is done is this: each Minister prepares (or has prepared for him by his permanent officers) an estimate of the expenditures required for the coming year; these are all examined in Council especially by the Finance Minister who has to provide the money—for Governments like all others must cut their coat according to their cloth—and the whole Administration must assume liability for every estimate and every item in it, there being no such thing as divided responsibility.

The estimates are submitted by the Minister whose estimates they are, at a convenient time early in the Session, to the House of Commons with a formal message from His Excellency.

Before discussing the division of legislative power between Dominion and Provinces, it may be well to consider briefly the power of disallowance.

When a bill has passed both Houses of Parliament it is presented to the Governor-General for the Royal assent; he may give the Assent at once and in the vast majority of cases he does so, acting on the advice of his Ministry for, of course, the bill could not have passed the House of

Commons without the approval of the Ministry expressed or implied. If the assent is given, the bill is sent to the Home Administration and there examined; if found unobjectionable from an Imperial point of view, no more is said of it.

The bill may, however, be found to contain provisions thought not to be wholly consistent with the good of the Empire and it may be disallowed at any time within two years—one bill has been thus disallowed but on the ground that it was *ultra vires*[19] ("unconstitutional" in the American sense).

The usual course, however, is for the Imperial Government to communicate with the Canadian Government to explain fully the objectionable features, and then the Canadian Parliament at the next session heals the defects.

In theory, the Governor-General may, as in theory the King may, refuse the Royal assent—he never does in fact; if he has any doubts he may reserve the bill for His Majesty's pleasure. One such bill has been refused the Royal assent at Westminster,[20] all others have been assented to.

In Provincial matters the Lieutenant-Governor has always acted upon the advice of his Ministers and has never assumed to act on his own judgment in cases in which the question of disallowance of legislation has arisen.

For some time after Federation, it was the theory at Ottawa that the Local Parliaments were somewhat on a par with Municipal Councils—"A big County Council" was the favourite way of expressing the thought. There were many cases of disallowance where the Dominion and the Provincial Governments were of different politics, some which can hardly justify themselves at the bar of history; about seventy Provincial Statutes have been disallowed by the Dominion. But for several years the practice has been settled for the Dominion not to interfere except where the legislation is plainly *ultra vires* the Provincial Parliament. It has been thought that the people of each Province are the best judges of the laws they are to be governed by; if they do not approve of any legislation, they have the remedy in their own hands. We have Home Rule fully developed.

We come now to the division of legislative power.

The whole domain of legislation, civil and criminal, is covered by either Dominion or Province, *i.e.*, so far as it affects Canada: Canada has not, like Britain, extra-territorial power.[21]

Again, the Dominion Parliament and the Local Legislatures have (within the ambit of their juris-

diction) the same full and ample power which the Imperial Parliament has.

The powers of the Legislature of the Province are the same in intension, though not in extension as those of the Imperial Parliament. The Legislature is limited in the territory in which it may legislate and in the subjects: the Imperial Parliament is not—that is the whole difference. . . . The power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined either for causes or persons within any bounds. . . . It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man and a man a woman. . . . An Act of Parliament can do no wrong though it may do several things that look pretty odd.[22]

This is the hardest saying for many Americans, whose legislative bodies have their powers cribb'd, cabined and confined by the letter of the Constitution of the United States or of the particular State—they are horrified to hear a Court say: "The Legislature within its jurisdiction can do everything which is not naturally impossible, and is restrained by no rule human or divine. . . . The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body, and there would be no necessity for compensation to be given."[23]

To put the matter in a sentence—the people of the Dominion keep in their own hands the power to legislate for themselves as they please; if any one does not like that principle, he may stay away or go away from the country.

And we do not propose to be bound by the ideas of a past generation; no Parliament, Dominion or Provincial, can bind any future Parliament or even itself.[24]

But while we do not allow a Court to set aside legislation as unwise or unjust, opposed to natural justice or what not, it is sometimes necessary for the Courts to enquire whether particular legislation of Dominion or Province comes within the ambit of the powers conferred by the British North America Act. We have seen that the Dominion does not now disallow Provincial Legislation unless in the opinion of the Dominion Government it is *ultra vires* the Province. But even if allowed by the Dominion to pass, it does not always follow that it is *intra vires*—it may be called in question by a private litigant and then the Court is bound to determine whether the Province had the right to deal with the subject-matter of the litigation. If so "arguments founded on alleged hardship or injustice can have no weight";[25] if not the legislation is void, however valuable and benevolent it may be.[26]

Consideration of particular instances of determination of jurisdiction would lead us here too far afield, and I do not now enter upon such an enquiry.

It may not be out of place to say a word or two concerning the practical working of the bicameral system at Ottawa.

Because peculiar circumstances—perhaps the small size of the Chapter House at Westminster—brought about two Houses of Parliament in England, the United States, the Dominion of Canada, all the States of the Union, and two of the nine provinces of the Dominion have two Houses in their Legislature; and it is hard to convince some Americans and a few Canadians that this is not the ideal state of things. We in Ontario have got along for nearly fifty years without feeling the need of an Upper House; but then, of course, we are Radicals. Whether if any one were set to it to frame a Constitution for a people who never have had one, he would erect two houses of legislation to correct each other's errors, every one must decide for himself; we in Ontario want none of it in Ontario.[27]

In the Dominion Parliament (and also in two of the Provinces) there are two Chambers with sometimes odd results.

In the old Parliaments of the Provinces before Confederation, particularly in early times, the

two Houses had many quarrels, generally, however, concerning the control by the Lower House over the money of the Province, which really is the essence of Responsible Government.

But the principle of Responsible Government being firmly established by the time of Confederation, the disputes since Confederation have been not constitutional but (however disguised) largely political.

Senators are appointed by the Administration and from the same party—they are men as a rule of mature years and their rate of mortality is rather high (although it is said that the Senate is conducive to longevity and at least one Senator of Canada died over a hundred years of age).[28]

The result is that if an Administration remains long in power, there is a decided preponderance in the Senate of members of that political party—and the majority are disposed to be critical of the measures of a Government displacing that of their own party. As time goes by, deaths occur and the pendulum swings the other way: the result is that it is only during the first years of an Administration that the Senate is to be feared,[29] in a very few years it supports the Government.

When the Senate is of the same political party as the Commons, very little is heard of a movement to abolish or amend it: when it is trouble-

some by refusing to carry Government measures, a cry is raised by some for its abolition or amendment, but this is not continuous or influential. While there are a few who consistently urge such a scheme, however the Senate may be constituted, they are only a few: in most cases, it is the political creed of the voter which determines his view of the usefulness of this second Chamber—and in any case we escape the undemocratic result of a second Chamber being always of one political party.[80]

The Legislative Councils in the two Provinces which still retain them, are of little consequence—they have the same opportunities for obstruction and annoyance to an incoming Administration as the Senate but do not seem to have taken much advantage of them.

No Province with only one Chamber has ever desired two; while at least one of those with two has groaned under the imposition. Nor has there been found crudity or want of thought more in the monocameral than in the bicameral Provinces.

NOTES TO LECTURE III

[1] There was a time when the misunderstanding by many Americans of the true condition, politically and constitutionally, of Canada and Canadians was the cause of much annoyance and exasperation; but we have learned better and now it rather amuses.

The several invasions of Canada by its neighbours from the South have all been ostensibly to free Canadians from bondage, and nothing could exceed the astonishment of the would-be deliverers at the want of appreciation and gratitude on the part of the slaves they had come to set free.

Arnold and Montgomery in 1775-1776 were as benevolent in their intentions as Hull in 1812. Hull in his Proclamation (said to have been written by Lewis Cass and certainly approved by him) told the Canadians: "I come to protect not to injure you. . . . The arrival of an army of friends must be hailed by you with a cordial welcome. You will be emancipated from tyranny and oppression and restored to the dignified station of freemen." After that, who can be so suspicious as to attribute the invasion of Canada to the schemes of conquest of Henry Clay and his War Hawks?

General Thomas Jefferson Sutherland at the head of an army of American "Sympathisers" in 1838 addressed the unhappy Canadians thus: "You are called upon by the voice of your bleeding country to join the Patriot forces and free your land from tyranny. Hordes of worthless parasites of the British Crown are quartered upon you to devour your substance—to outrage your rights—to let loose upon your defenceless wives and daughters a brutal soldiery. Rally then, around the standard of liberty and victory and a glorious future of independence will be yours." And there is nothing to indicate that he was

not perfectly sincere. Even the Fenians in 1866 express their desire to set Canada free from British tyranny.

On every occasion of invasion there was the intention to raise the victims of monarchical oppression to the glorious height of freedom assured by American citizenship: and on every occasion Canadians resisted to the death.

"Who would be free themselves must strike the blow."

[2] The list of Governors-General includes the names of Viscount Monck, Lord Dufferin, the Marquis of Lorne (afterwards Duke of Argyle, son-in-law of Queen Victoria), the Marquis of Lansdowne, Lord Minto, Lord Stanley of Preston (afterwards Earl Derby), the Earl of Aberdeen, the Duke of Connaught (the son of Queen Victoria and uncle of the present King), and the Duke of Devonshire.

[3] As indicating that many of the English people do not understand the true position of the Governor-General, reference may be made to the remarks of an English newspaper when the present incumbent was appointed, that "the Duke of Devonshire had all the qualifications for ruling a colony." No Governor-General or Lieutenant-Governor *rules* in Canada.

[4] It may seem strange to say that the Party system is much more developed and mature in Canada than in the United States: but I venture to assert that that is true. In Canada, every great measure is the work of one or other party (I except what is done in time of war when all rules are disregarded). If it be said that the same is the case in the United States, I ask what Party is responsible for Mr. Taft's proposed reciprocity measure? for the Spanish War? for the recent "filibuster"?

[5] Third parties have so far not been of much moment in Canada—the most promising of them were perhaps (1) the "Equal Rights Party" which came into existence as a protest against the Province of Quebec being permitted to pay to the Jesuits a certain amount of money for their estates confiscated after the Conquest in 1759-1760—this

was a Dominion Party which thought that the Provincial Statute awarding the Jesuits compensation should have been disallowed; (2) the "Grangers," rather a Provincial party in Ontario with somewhat indefinite views as to the rights of the farming community. These parties are now practically if not wholly defunct. No such spectacle was ever exhibited in Canada as that presented at the Presidential Election in the United States in 1912 and many previous elections.

[6] This was the method in which (Sir) Wilfrid Laurier was selected as leader of the Reform (Grit) Party in 1887, and (Sir) Robert Borden, leader of the Conservative (Tory) Party in 1901. The present leader of the Opposition in Ontario was elected at a convention of the Reform Party.

[7] The Government sometimes instead of resigning advises the Governor-General to dissolve Parliament; he may assent and if the party in power can obtain a majority in the new House of Commons it retains the seals of office: if it be defeated it must resign. The present practice is for the Government to resign as soon as it is certain that it is defeated at an election; but it cannot yet be called unconstitutional for the defeated Government to hold office till it is voted down in the House of Commons.

If the Governor-General refuse to allow a new election, he must find some Ministry which will assume the responsibility for such refusal—this he does by sending for the Leader of the Opposition, and in most instances he will demand and be granted an election.

[8] There is no such body as "the Opposition" known in the written Constitution and no such person as "the Leader of the Opposition": but everybody knows them, and the Leader of the Opposition at Ottawa is paid a salary of $7,000 by the country—R. S. Can. (1906), c. 10, s. 39—in addition to the sessional allowance of $2,500 given to all Members of Parliament—R. S. Can. (1906), c. 10, s. 37.

This affords a not very remote analogy with the *Advocatus Diaboli* in Courts which are to pass upon the proposed canonisation of a saint—and to the employment and payment by the State of Counsel for an accused upon his trial.

[9] It is not unusual for the Opposition to allow a Minister to be returned by acclamation: but this is by no means universally the case, and, speaking generally, it may be said that the Minister is opposed when there is good chance of defeating him.

[10] At present $7,000 (except the President of the Privy Council, the Prime Minister, Sir Robert Borden, who receives $12,000).

[11] This is not necessarily the case: till a short time ago the Solicitor-General was not a member of the Cabinet: in the British Isles it is the normal condition that several Ministers are excluded from the Cabinet.

[12] In England the Privy Council meets as a body only on the demise of the Crown: in Canada, not even on that event.

[13] At present there are eighteen members of the Cabinet: (1) Sir Robert Borden, President of the Privy Council; the Ministers (2) of Trade and Commerce; (3) of Public Works; (4) of Railways and Canals; (5) of Finance; (6) of Marine and Fisheries; (7) of Justice; (8) of Militia and Defence; (9) of the Interior and of Indian Affairs; (10) of Labour; (11) of Customs; (12) of Agriculture; (13) of Inland Revenue; (14) the Postmaster-General; (15) Secretary of State—these are all paid; (16) Solicitor-General and two without portfolio (or salary).

[14] His Honour Luc Letellier de St. Just, Lieutenant-Governor of Quebec, in March, 1878, dismissed his Ministers because they did not receive with due consideration his recommendations, particularly in respect of a bill which in his opinion would deprive Her Majesty's subjects in Quebec of their undoubted right to the protection of the Courts of

Law. He sent for M. H. G. (afterwards Sir Henri) Joly, the Leader of the Opposition, who formed a Ministry but could not carry the Legislative Assembly (he was defeated by 32 votes to 13); he then applied for and obtained a dissolution. The new House was almost evenly divided, and as the session proceeded the Ministry lost strength and the Legislature was prorogued.

The existing Dominion Administration was of the same politics as Joly: and a resolution was voted down in the House of Commons (though it carried in the Senate) which asserted that the action of Letellier was opposed to the principles of Constitutional Government.

The next Dominion Parliament saw the other party returned to power, the resolution was passed and the Governor-General was advised by his Ministry that "the usefulness of Mr. Letellier as Lieutenant-Governor of Quebec was gone," and he was removed.

In 1891 an investigation by a Committee of the Senate of Canada seemed to show that grave irregularities or worse had taken place in the dealings of the Quebec Government headed by M. Honoré Mercier, the Lieutenant-Governor. His Honour A. R. Angers insisted on the matter being investigated by a Royal Commission of three judges, the evidence before whom developed new and startling facts. After an interim report by two of the judges (the third being ill), the Lieutenant-Governor dismissed the Ministry and sent for de Boucherville, the Leader of the Opposition who formed a new Ministry. An election demanded by the new Administration resulted in a complete victory, as more than two-thirds of the new Assembly were supporters of the Government.

15 Two years ago in Manitoba, grave charges were made of frauds in public buildings being erected by the Province: no sufficient enquiry could be made by the House as the Government had there a considerable majority: the Lieutenant-Governor, Sir Douglas Cameron, insisted on the

appointment of a Royal Commission to investigate—the evidence before the Royal Commission showed over-payments to the contractor with the knowledge of a Government architect—the Government resigned and Mr. Norris, the Leader of the Opposition, was sent for: he formed a Ministry and at the ensuing election was overwhelmingly successful. The contractor, Kelly, was convicted and sent to the penitentiary; the jury disagreed as to the guilt of Sir Rodmond Roblin, the *quondam* Prime Minister, and his surviving associates, and they have to be tried again.

16 The appointments are not always (though frequently, indeed generally) made for political services rendered or because the appointee has been or is a political partisan—for example, Mr. (afterwards Sir) James Robert Gowan, a retired County Court Judge, was appointed in 1895 and proved a most useful Senator.

Politics run as strong and party lines are as closely drawn in Senate as in House. It is not wholly without precedent that a Senator has changed to the dominant party: but it cannot be said that he increased his reputation by the change.

17 On the admission of British Columbia into the Dominion, it had been agreed that the Dominion should build a transcontinental railway connecting British Columbia with the remainder of Canada, work to begin in two years, to be completed in ten. On the defeat of the Macdonald Administration which had made this agreement, Alexander Mackenzie came into power with a policy to build the railway more slowly, utilising "the water-stretches." British Columbia was insistent. Mr. (afterwards Sir) James D. Edgar went out as agent of the new Dominion Government, to arrange terms of compromise if possible, but failed. The Dominion Administration hoped to placate the angry British Columbians by building in their Province a railway about sixty-five miles long, from

Esquimalt to Nanaimo: the House of Commons passed a bill for this purpose but the Senate rejected it—the dominant party in the Commons was the Reform (or Grit) Party, but in the Senate the Conservatives (or Tories) were in the majority.

Mackenzie's Government made an application to Her Majesty to direct that six members should be added to the Senate "in the public interests": but though it was not so stated in the application, it was obvious that the real object was to overcome the adverse majority of Conservatives in the Senate, and the application was refused.

The British Government knows better than to assist one Canadian party against the other—that would not be constitutional though wholly legal.

[18] Sections 53 and 54. Sometimes for convenience bills involving public expenditures are introduced in the Senate: the money sections are printed in the bill so as to make it intelligible, but these sections are always struck out in Committee. When the bill is sent up to the Commons, these sections are in red ink or italics and supposed to be blank and inserted in the Commons.

While by Rule of the House of Commons copied from the celebrated Rule passed by the Imperial House of Commons, July 30, 1878 (9 E. Com. J. 235, 509), when the House of Lords rejected the Paper Duties Bill, the "aid and supplies granted to His Majesty . . . are the sole gift of the House of Commons . . . and . . . such grants . . . are not alterable by the Senate," instances have been known, not many in number and "not to be drawn into a precedent," that an amendment in the Senate has been acquiesced in by the Commons—for example, when such a course has been found necessary so as not to delay the passage of a bill at a late period of the session.

The usual course, however, is to give the Senate an opportunity of withdrawing its unconstitutional interference.

[19] In May, 1873, a bill which had been passed by the Canadian Parliament to provide for the examination on oath of witnesses before Parliamentary Committees in certain cases, was transmitted to Westminster with a memorandum by the Minister of Justice expressing doubts of the competency of the Canadian Parliament to pass the bill. The Law Officers of the Crown advised Her Majesty that the Act was *ultra vires* and it was disallowed, as the Canadian Government had in effect invited.

[20] In the first session of the first Parliament of the Dominion, a bill was passed for reducing the salary of the Governor-General from £10,000 to £6,500: this the Governor-General, Viscount Monck, reserved for Her Majesty's pleasure. The Secretary of State for the Colonies notified Lord Monck that while it was with reluctance and only on serious occasions that the Queen's Government could advise Her Majesty to refuse assent to a bill passed by the Canadian Parliament, the effect of this bill being to reduce the Governor-General to the third-class of Colonial Governors, it was thought it should not become law.

In 1869 the Dominion Parliament fixed the salary at £10,000 ($48,666.63).

The power of disallowance by the Home Government began in very early Colonial times, indeed in the time of the government of colonies by Chartered Companies. The history of this power is given very fully in an Article, "The Royal Disallowance," by Prof. Charles M. Andrews of Yale University, in the Proceedings American Antiquarian Society, October, 1914.

There is also a valuable discussion in a publication of the Department of History, etc., Queen's University, Kingston, Ontario, No. 22, January, 1917, "The Royal Disallowance in Massachusetts," by Prof. A. G. Dorland of that University.

[21] For example, the Imperial Parliament could make

it a crime for a British subject to go to the top of Pike's Peak: Canada could not: but she could make it a crime for any one to go to the top of (say) the Mountain at Montreal.

[22] Language of my own in giving judgment in the case of Smith *v.* City of London, (1909), 20 O. L. R., 131 at p. 137.

[23] Language of my own in giving judgment in Florence *v.* Cobalt, (1908), 18 O. L. R., 275 at p. 279. The Florence Mining Company claimed that it had performed all conditions precedent to entitle it to the ownership of a valuable mining claim, but the Ontario Government sold it to the Cobalt Mining Company, and the Ontario Legislature passed an Act confirming this sale. At the trial, I took it as proven that the Florence Company had owned the claim and held that the Legislature had the power to take it away and give it to the Cobalt Company without compensation. This decision created much dismay and some indignation—Goldwin Smith was especially outraged by it—but it was a mere commonplace. The Court of Appeal for Ontario and the Judicial Committee of the Privy Council both confirmed the judgment: both based their judgment on the ground that the Florence Company was not entitled to the claim, but both expressly approved of the law as I had laid it down.

I have received within the month in which these lines are written, a letter from a very prominent and public-spirited American lawyer in which he asks me to modify certain remarks made at the recent meeting of the "American Society for the Judicial Settlement of International Disputes" on this subject; and he adds:

"My principal reason for the request is this: There are in this country some men in the courts and in universities who claim that exercise of the power to declare acts of the legislature unconstitutional or—as your courts express it—*ultra vires,* is a usurpation. They would take advantage

of your statement to fortify their argument, and without reference to what you afterwards said will quote you as saying that the Legislature of Canada had unrestricted power and was not bound even by the Ten Commandments. You would, I am sure, regret that you should furnish ammunition for their mischievous campaign."

I could give my friend no comfort.

[24] "The Legislature has no power to control by anticipation the actions of any future Legislature or of itself." Smith *v.* City of London, 20 O. L. R. at p. 142.

[25] The language of the late Sir Charles Moss, Chief Justice of Ontario (*valde defiendi*), in Florence *v.* Cobalt, 18 O. L. R. at p. 293.

[26] Where the question is raised of the power of the Legislative body, Dominion or Provincial, to pass a Statute, our Ontario Courts require the Attorneys-General of the Dominion and of the Province to be notified so that they can be heard before the question is disposed of.

Moreover, either before or after the passing of legislation, the Government may require the opinion of the Supreme Court of Dominion or Province, as the case may be, as to the validity of such legislation proposed or actual. Counsel are appointed and paid by the Government (usually) to argue both sides.

[27] The quotation is from an address by myself delivered before the Wisconsin State Bar Association at Green Bay, Wisc., June 24, 1914.

[28] The Honourable David Wark from Fredericton, New Brunswick, who, born in 1804, was a member of the Senate till 1905: Sir Mackenzie Bowell is still active in the Senate in his ninety-fourth year.

[29] The first Administration in Canada was the Conservative Administration of Sir John A. Macdonald: when that was defeated in 1872, the incoming Reform Administration of Alexander Mackenzie found an adverse majority

in the Senate. As at first constituted in 1867, it was fairly divided between the political parties, but Macdonald had seen to it that Conservatives were appointed to vacancies. The Senate voted down the Government railway scheme, and the Home Administration refused to add members to the Senate.

One of the members of the Government proposed that the Provinces should elect their own Senators, and that their term should be limited—the House was not in favour of abolishing the Senate altogether, and nothing had been accomplished when Macdonald came into power again in 1878. No trouble was met with in the Senate till the Conservatives lost power in 1896; in the first session of the new Administration of Sir Wilfrid Laurier, a railroad scheme for opening up the Yukon Territory was voted down by the Conservative majority in the Senate, and the Senate proved troublesome in other respects.

But time heals all; Conservative Senators die as well as Reformers—and only Reformers were appointed, so that when Sir Wilfrid went out on the Reciprocity policy in 1911, the Reformers were in the majority.

Sir Robert Borden who succeeded Sir Wilfrid had his troubles with the Reform Senate as Sir Wilfrid had with the Conservative Senate. A bill to give ships of war to the Fleet instead of Canada building and owning ships herself was voted down; additional representation in the Senate was delayed until after the present Parliament, etc.

But death has not been idle—and the present Government may, when it will, have a clear majority in the Senate.

80 There does not seem to be a real movement of any importance for the abolition of the Senate. Logically it is hard to find an excuse for its existence, but we are not a logical people—if an institution works well or even does no great harm, we are likely to leave it alone whatever we might do if we were framing an entirely new scheme.

NOTE ON ADMINISTRATIONS (SINCE CONFEDERATION) IN THE DOMINION OF CANADA AND THE PROVINCE OF ONTARIO

In the Dominion

1. The two political parties in "the Canadas" (*i.e.*, the United Province of Canada, composed of Upper and Lower Canada) had in 1864 joined hands and formed a Coalition Government under the Premiership of Mr. John A. Macdonald, for the purpose of bringing about a Confederation of British America—this Government had been weakened in 1866 by the withdrawal of George Brown, the most influential and powerful of the leaders of the Reform (Clear Grit) party. But others of that party remained in the Government—when Confederation became a fact, a Reform Party Convention in Upper Canada condemned Coalition (except for a temporary purpose), but nevertheless these gentlemen accepted the invitation of Mr. Macdonald to join his Ministry for the Dominion. The first election resulted in favour of the Coalition Government, and the first Prime Minister of the Dominion (now become Sir John A. Macdonald) had a large majority in the House of Commons.

Macdonald had made his way, without early advantages, to the leadership of the Conservative Party by sheer determination joined to unrivalled skill in political management of men and no small amount of intellectual capacity. Alexander Mackenzie, who had been a working stone-mason, speedily established himself as Leader of the Opposition. While the form of a Coalition was kept up, in fact the Administration became in substance Conservative.

In November, 1873, the House of Commons passed a vote of want of confidence in the Ministry—they had been charged with receiving large sums of money from a contractor for election purposes, "the Pacific Scandal." The Ministry at once resigned. Mackenzie was sent for by His Excellency: he formed a Ministry, and in January, 1874, went to the country. Since the defeat of Sir John A. Macdonald there has never been any pretence of Coalition or non-party government in the Dominion.

2. At the general election, the Reform Party obtained an overwhelming majority, 161 Members in a House of 205. But Macdonald remained Leader of the Conservative Party, having been retained by a caucus of his followers, and at

the general election in 1878 that party obtained a majority, having 146 Members in a House of 206, on the issue of Protection, "the National Policy," as it was and still is called.

Mackenzie resigned at once without waiting for an adverse vote of the House; Macdonald was sent for and formed a Ministry, purely Conservative.

3. Macdonald remained Prime Minister till his death, having no rival in the affection and confidence of his Party. Mackenzie, April, 1880, resigned his leadership of the Opposition and was succeeded by Edward Blake (previously Prime Minister of Ontario and afterwards a member of the Imperial House of Commons), who was elected Leader of the Opposition at a caucus of the Liberal Members of Parliament much against his own desire, it is said. Mr. Blake remained Leader of the Opposition and led the Reform forces at the General Elections of 1882 and 1887, but unsuccessfully. His health gave way and in June, 1887, he met his party in caucus and insisted that his resignation should be accepted. For a short time the leadership was "in commission," but June 7, 1887, Mr. (now Sir) Wilfrid Laurier was chosen leader by the party caucus: he has ever since been the leader of the Reform Party whether in power or in opposition.

Sir John went to the country in 1891 and succeeded in obtaining a majority, but he died June 6 of that year.

Mr. (afterwards Sir) John J. C. Abbott, a Senator and a member of the Ministry without portfolio, was entrusted with the duty of forming a Ministry, which he did by continuing his colleagues in office and himself becoming President of the Council.

4. The Abbott Administration, confessedly a stop-gap, lasted till November, 1892, when Abbott resigned and Sir John S. D. Thompson became Prime Minister.

5. He continued such till his death at Windsor Castle in 1894. Senator Mackenzie Bowell, the senior Privy Councillor and Minister of Railways in the Thompson Government, succeeded December, 1894.

6. Sir Mackenzie's Administration had many dissensions; Ministers deserted their chief and at length a compromise was reached that he should be Prime Minister till the end of the then current session (of 1896) and be succeeded by Sir Charles Tupper, Bart., then the High Commissioner in London and one of the most forceful and able members of the Conservative Party. Sir Charles

entered the House of Commons as Leader of the Government in that House, and when Parliament was prorogued he became Prime Minister and proceeded to reorganise the Cabinet, which was sworn in May 1, 1896.

7. His Premiership was short: he must needs go to the country as the term of this, the seventh Parliament, had expired. The main issue at this election was whether the Dominion should interfere with the legislation of the Province of Manitoba which, it was claimed, interfered with rights of Roman Catholics in respect of their separate schools. The electorate gave a decided negative to the proposition. At the election, June 23, 1896, there was a *débâcle* comparable to that of 1878 but affecting the opposite party—the Liberals returned 119 against 89 Conservatives (there were 3 Patrons of Industry, "Grangers," and 2 Independents). Tupper resigned July 8, without waiting for an adverse vote: Laurier was sent for and July 13 he completed his Cabinet.

8. Laurier's Administration weathered the General Election of November, 1900, with a majority of 53, that of November, 1904, with a majority of 52, and that of 1908 with a majority of 47. In September, 1911, Sir Wilfrid took the opinion of the electors on the reciprocity offered by the United States—the vote was adverse, 133 to 88—and he resigned the following month.

On the defeat of Sir Charles Tupper in 1896, he had retired from Canadian public life and at a caucus of the party in 1901, Robert Laird Borden was elected Leader of the Opposition.

Mr. (now Sir) Robert Borden was sent for and formed a Ministry.

9. Sir Robert Borden's Ministry is still in power.

The following then are the Prime Ministers of Canada since Confederation:

1. Sir John Alexander Macdonald, July 1, 1867, to November 7, 1873.
2. Hon. Alexander Mackenzie, to October 17, 1878.
3. Sir John Alexander Macdonald, to June, 1891.
4. Sir John J. C. Abbott, to December, 1892.
5. Sir John S. D. Thompson, to December, 1894.
6. Sir Mackenzie Bowell, to April, 1896.
7. Sir Charles Tupper, Bart., to July, 1896.
8. Sir Wilfrid Laurier, to October, 1911.
9. Sir Robert Laird Borden, to ——.

Sir Wilfrid Laurier is the Leader of the Opposition.

In the Province of Ontario

At Confederation, John Sandfield Macdonald was entrusted with the formation of a Ministry for the Province of Ontario. His Ministry was, like that of the Dominion, ostensibly non-party: but the Liberal Party was as little tolerant of such a Government in the Provincial as in the larger field. It was not organised, however, and the first General Election resulted in a majority for the Government.

1. John Sandfield Macdonald had to contend with a very active Opposition whose leaders were Edward Blake and Alexander Mackenzie, both well known in the politics of the Dominion. Of the 82 Members, 46 were nominally Liberals and 36 Conservatives, but of the former 9 (afterwards known as "The Nine Martyrs") supported the Government. At the General Election of 1871 the numbers were not far from equal: the Government suffered defeat in the House and resigned, December, 1871. Mr. Blake was sent for by His Honour and formed an Administration.

John Sandfield Macdonald refused to attend a Conservative caucus and Mr. M. C. Cameron was elected Leader of the Opposition.

2. The Administration of Edward Blake did not last long—legislation at Ottawa forbade "Dual Representation," *i.e.*, the same person being member of both the Dominion and the Provincial Parliament. Mr. Blake and Mr. Mackenzie resigned their seats in the Local House: and advised His Honour to send for Mr. (afterwards Sir) Oliver Mowat, then a Vice-Chancellor of the Court of Chancery. Mr. Mowat succeeded in forming a Ministry, October, 1872.

3. The Administration of (Sir) Oliver Mowat was the longest in the history of Responsible Government in any country, lasting as it did from 1872 to 1896, when he resigned to take a place in the new Dominion Administration of (Sir) Wilfrid Laurier. He survived the General Elections of 1875, 1879, 1883, 1886, 1890 and 1894.

On the resignation of Mowat, he was, in July, 1896, succeeded by Arthur Sturgis Hardy.

4. Mr. Hardy held the reins of power until failing health compelled him to retire from political life—he resigned October, 1899, and was succeeded by Mr. (afterwards Sir) George W. Ross, who had been his Minister of Education.

5. Mr. Ross was defeated at the General Election, January, 1905.

When Mr. M. C. Cameron went on the Bench as a Justice of the King's Bench, he was succeeded by Mr. W. H. Scott, Mr. (afterwards Sir) William Ralph Meredith (now Chief Justice of Ontario), Mr. Marter, Mr. Howland and finally by Mr. (afterwards Sir) James Pliny Whitney in succession as Leaders of the Opposition. Mr. Whitney was the Leader of the Opposition (chosen in caucus) at the time of the defeat of the Ross Administration: he was sent for and formed a Government.

6. His Government remained in power until his death in 1915, when he was succeeded by Mr. (now Sir) William H. Hearst.

7. Sir William Hearst is still at the helm of the Province.

The Prime Ministers of Ontario then have been:

1. John Sandfield Macdonald, July 1, 1867, to December, 1871.
2. Edward Blake, to October, 1872.
3. Sir Oliver Mowat, to July, 1896.
4. Arthur Sturgis Hardy, to October, 1899.
5. Sir George W. Ross, to January, 1905.
6. Sir James Pliny Whitney, to 1915.
7. Sir William H. Hearst, to ——.

After the retirement of (Sir) George W. Ross from Provincial politics, George Graham was elected Leader of the Opposition in Ontario by a caucus of the Reform Members of the Legislature; when Mr. Graham went to Ottawa as a Minister in the Laurier Administration, Alexander G. McKay, K.C., was elected in his stead by the same body. The present Leader of the Opposition, N. W. Rowell, K.C., was chosen at a Convention of the Reform Party, to succeed Mr. McKay.

LECTURE IV

A COMPARATIVE VIEW

THE spectacle of two peoples growing up side by side on the same Continent with substantially the same conceptions of liberty and justice, with substantially the same ancestry, with the same language and religion, the same literary models, and yet with diverse political methods, is one of very great interest.

Whether it is better for a nation to attain self-government by one stroke severing all political and national connection with the mother country or by steady pressure of a constitutional character gradually to achieve its rights without a violent severing of old ties or abandonment of the old flag, is a matter of opinion, of temperament, perhaps of taste.

The English Colonies in the eighteenth century followed the one, Canada the other course—and this to a very large extent explains our resemblance in national matters to Britain.

The British North America Act is a Canadian production as much as the Constitution of the

United States is an American production; in form it is the will of the Imperial Parliament, in fact the will of Canadian representatives reduced to the form of a Statute for formal, legal and "constitutional" reasons.

Naturally, as we remain part of the British Empire, the Sovereign is the head of our State: he cannot be present in person and therefore has a representative, the Governor-General, whose powers[1] are much the same in Canada as those of the King in the United Kingdom.

The real power, however, is in the Ministry, responsible to the people's representatives in the House of Commons.

The representation in the House of Commons is on much the same principles in both Home Country and Dominion—we have, however, gone further in providing for representation by population[2] from the several parts of the Dominion, resembling in that regard the United States.

In the Second Chamber there are fundamental differences—a limit is placed on the number of Senators and the principle of heredity is absent,[3] as it must be in a democratic nation. The limit placed on the numbers was necessary or at least was undoubtedly wise—the numbers from the several parts of the Dominion being kept within reasonable limits.

The most marked differences between the Imperial and Dominion Parliaments arise from the facts that the Imperial authorities must keep within their own hands the international relations[4] of the Empire and that some authority must exist to protect the interests of the Empire as a whole. The Imperial Parliament must retain power to deal with British subjects all over the world: Canada is not specially concerned with matters outside of her own boundaries.[5]

The contrast between the United States and Canada is more far-reaching than that between the United Kingdom and Canada.

A monarch (called a President) elected, not born and in consequence of birth succeeding under an Act of Parliament, ruling[6] for four years not for life, taking not only an active but even a determining part in the government of the country, really and not simply in form selecting his Ministry, a Ministry responsible to him and not to the people or their representatives—it is obvious that there is no real analogy between the President and our King. Nor is the analogy strengthened if we think of the Governor-General instead of the King with whom to compare the President.

The nearer analogy would be between President and Prime Minister; but the President, although

elected directly and immediately by the people (for we may disregard the solemn farce of the Electoral College) as the Prime Minister is indirectly and immediately, has when elected a fixed term of office; he is not bound to retain the confidence of the people's representatives—nay, he may in safety for months outrage the sentiments of the majority of the people and of their representatives as Andrew Johnson did—for since the failure of the proceedings for impeachment in the case of Andrew Johnson, no President need fear that bogy; it is as dead as the Royal Veto.

The House of Representatives and the House of Commons have a close analogy to each other: but the House of Representatives once elected need not fear that any power can dissolve it—its term is fixed and no Prime Minister or other person can send its members back to their constituents before the time irrevocably determined.

In a word, there is no way of taking the opinion of the people on any question.

In the second House, the American Senator is elected, the Canadian appointed by the existing Government; the former for a fixed term of years after which he must submit his record to his constituents, the latter for life, irremovable so long as he keeps solvent and innocent of crime and is able once in two years to attend his place

in Parliament—none in either Senate, however, transmitting his seat and title to a descendant.

In legislation the great and overshadowing difference between the United States and Canada consists in the written Constitution of the former limiting and defining legislative powers—*i.e.*, in what are called Constitutional Limitations.

"Littera scripta manet": the American may say, "I stand upon the letter of the Constitution: let the heathen rage and the people imagine a vain thing."[7]

And does all this not show that the Fathers of the Union had not confidence in the wisdom and justice of the people—the electorate? They were not content to leave to the existing or to future generations the power to act contrary to what they, these fathers, thought just and right. If it was not "No doubt but ye are the people and wisdom shall die with you," was it not perilously near to it? The result is that the people of the United States of America are governed, in part indeed, by the Legislatures elected by themselves, but in no small measure by the hand and voice of the dead.[8]

This is the essence of what is so often made a boast, namely, that its government is a government of law and not of men. Wherever there is a written Constitution limiting the powers of

legislative and executive bodies, there must of necessity be a judicial body to interpret the meaning of the Constitution; there must of necessity be a tribunal to determine the meaning of the document in case of dispute. That tribunal could not well be the Legislature or the Executive itself, but it must be a separate tribunal and can only be a court. The absence of such a tribunal means anarchy, the decision as to the limits of its own power under a written Constitution by Legislature or Executive means tyranny—neither of which the Anglo-Saxon can bear.

I shall now give a few examples to shew how in practice the written Constitutions in the United States have hampered the free action of legislation, with illustrations from our Canadian legislation.

The Federal Constitution provides that no State shall pass any law impairing the obligation of contracts—this provision has had far-reaching effects. A charter granted for a college (*e.g.*) is considered a contract. For example, in 1769 the King, George III, granted to the Trustees of Dartmouth College in New Hampshire a charter of incorporation as a private charitable institution. After the Revolution and in 1816, the Legislature of the State of New Hampshire passed an act taking away from the trustees the govern-

ment of this college and vesting it in the Executive of the State—in other words, changing the college from a private to a state institution. The act, while continuing the trustees as a corporation as Trustees of Dartmouth University, purported to form a new body called a Board of Overseers, of whom the President of the Senate and the Speaker of the House of Representatives of New Hampshire, the Governor and Lieutenant-Governor of Vermont were *ex-officio* members—and to this Board of Overseers was given the power of confirming or vetoing the acts of the trustees relating to the appointment and removal of president, professors and permanent officers, the determination of their salaries, the establishment of professorships, the erection of new buildings, etc. The Legislature later on in the same year passed another statute making it an offence for any one to act as president, professor, etc., except in conformity with the Act just named. One Woodward had been secretary-treasurer of the corporation before the passing of the Acts, but he apparently took sides with the Legislature (since he was removed by the Trustees of Dartmouth College before the last Act) and he was reappointed by the Trustees of Dartmouth University organised under the new Acts. The old board brought an action against him for taking

possession of the books of their records. It will be seen that the simple question was: Had the new corporation of Trustees of Dartmouth University any power? That depended upon whether the acts of the Legislature were valid. The Supreme Court of New Hampshire decided that the Legislature had not exceeded its authority, and so dismissed the action: and an appeal was taken to the Supreme Court of the United States. The case for the old board was argued by the celebrated Daniel Webster;[9] and the Supreme Court decided that the charter was a contract. The Chief Justice, the well-known John Marshall, says, "It can require no argument to prove that the circumstances of this case constitute a contract." Then the court proceeded to hold that this charter was a contract of the kind protected by the Constitution, and that the Legislature had no right to change it in any way.

In Upper Canada, a Royal Charter was obtained from George IV in 1827 for the University of King's College at or near the town of York (now Toronto). It contained provisions that the Governor should be Chancellor, the Anglican Bishop of Quebec should be Visitor and the Archdeacon of York should be President by virtue of their offices, that all members of the Council should be members of the Church of England and Ire-

land, and that students in divinity must take the same oaths as were required at Oxford. The Legislature of Upper Canada in 1837 took away the visitorship from the Bishop, the presidency from the Archdeacon and abolished all religious tests whatsoever.

That, however, was nothing to what was done twelve years later; in 1849, much of the charter was repealed and amended, the whole constitution was changed, the name became "The University of Toronto," the Chancellor elective, and he was not to be an ecclesiastic or minister of any faith.[10] The President was to be appointed by the Provincial Administration, the Faculty of Divinity was abolished, a Senate formed, and the property of the University vested in a new board. No doubt King's College was a small college and had those who loved her, but no dramatic eloquence even of a Daniel Webster would have induced a Canadian court to hold that the Legislature had exceeded its powers in such legislation. Very many such instances are to be found, for example in New Brunswick, "the University of New Brunswick," in Nova Scotia, and elsewhere. So in the Dominion, but the other day, the relation of the Queen's University to the Presbyterian Church was radically changed.

In the provision that no State may pass a law

impairing the obligation of contracts, "contracts" is considered a very extensive and comprehensive term. When the State of Georgia had granted certain land, this grant was called a "contract" by the Supreme Court, and an Act of the State Legislature annulling the grant upon the expressed ground of fraud was held to be unconstitutional.[11] In Canada no one doubts that the decision would have been the other way. In 1897 and 1899 certain water rights were given on and near the Kaministiquia River to one J.; these were in 1902 taken away from him and restored in 1904—all by the Province of Ontario.

After a State has agreed to grant lands to a company upon conditions, and the grantee has fulfilled the conditions of the grant and so earned the lands, it is not competent to pass further legislation that the lands shall not be conveyed to the company except upon a further condition.[12] In Ontario,[13] a certain company claimed to have fulfilled all the conditions necessary under the statute to entitle it to the grant of certain mineral rights. The Government disputed the right of the company, and made a sale of these rights to another company. An action was brought, but pending the action, legislation was passed declaring the latter company entitled. The action came on for trial before myself and I declined to pass

explicitly upon the question whether the requirements of the statute had been fulfilled by the original company, as I considered this quite immaterial. I held that even supposing the first-named company owned the land, the Legislature had the power to take it away and give it to another. This view of the law was approved by the Court of Appeal, and by the Judicial Committee of the Privy Council. The following language was used in my judgment:

"If it be that the plaintiffs acquired any rights . . . the Legislature had the power to take them away. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body."

This decision made some commotion, and it was attacked by some who should have known better. They based their attack chiefly on the provisions of Magna Charta, not knowing or not appreciating that a British Legislature has the power to repeal even Magna Charta so far as it affects the territory subject to such Legislature; and, indeed, most of Magna Charta is repealed in Ontario.[14]

An agreement by a State Legislature to bind its own hands by a grant so as to preclude it from exercising its sovereignty in that regard in the future has been held by the Supreme Court to be

valid in certain cases of taxation and exclusive privileges. Whether the police power can be thus alienated is a different and a difficult question. But in Canada, "the Legislature has no power to control by anticipation the actions of any future Legislature or of itself."[15]

I have already indicated the powers of a Canadian Legislature in respect of private property. It may be said broadly that a Provincial Parliament has the power to say that Blackacre, now the property of A, shall hereafter be the property of B—and so it will be—and that without the necessity of making compensation. The whole learning as to Eminent Domain is of no interest in Canada. The Legislature may, indeed, direct compensation to be paid; but that is in no sense necessary.

In many jurisdictions, *e.g.*, New York, Michigan, Alabama, it has been considered that the State cannot authorise owners of mill-privileges to expropriate the land above in order to increase the head. In Ontario, we have long had such legislation, and no one has doubted its validity. Compensation is, indeed, directed by the Act to be paid: but that is not at all necessary for the validity of the statute.

A statute of New York authorised any person to take into his custody any animal trespassing

upon his lands and to give notice to the justice or a commissioner of highways of the town, who should proceed to sell the animal after posting notices. This was held invalid in the Courts.[16] In Ontario[17] any one may distrain a trespassing animal on his land. If this animal be a horse, cow, pig, etc., he may either take it to the public pound or retain it, giving notice to the clerk of the municipality. After certain notices, the animal may be sold if not redeemed or replevined.

The State Legislature cannot authorise the compulsory extinguishment of ground rents on payment of a sum in gross.[18] But in Prince Edward Island, lands which had been in the possession and ownership of "Proprietors" and their predecessors in title for many years were taken from them by the Act of 1874 upon payment into the Treasury by the Government of a lump sum, determined by commissioners. This, indeed, is not unlike "eminent domain," since the act is passed for "the contentment and happiness of the people," and there was "no reasonable hope of" the Proprietors "voluntarily selling their Township lands to the Government at moderate prices."

In Quebec, as we have seen, the land was at first held in seigniority, the seignior (generally a

noble) had under him the *censitaires* or tenants, "habitans" they called themselves, who were bound to render certain services, pay certain rents, etc.

In 1854, the united Province of Canada directed the value of all these rights to the seignior to be determined by commissioners appointed by the Governor, and upon their report being filed, and notice thereof published in the *Official Gazette*, the habitant was relieved of all duties, etc., except the fixed yearly rent, and thereafter held his land in *franc-aleu roturier*—at his option he might pay a lump sum once for all.

In this instance all the feudal duties were turned into a money payment—yearly, indeed, unless the tenant paid a lump sum. No one doubts that when the Legislature said that a lump sum might be paid instead of the *rente constituée*, it was perfectly valid legislation.

So at Westminster, in the Imperial Act of 1869, by which the Irish Church was disestablished, there was a provision taking away all right of advowson or power of appointment to a church. Such a right becomes effective only at certain—or rather uncertain—intervals; but the Parliament took it away entirely and directed the former owner if he applied for compensation within three years to be paid a lump sum fixed by commissioners.[19]

In the United States it is said the Legislature cannot validate an invalid trust or will,[20] or give land absolutely to one who, under a will, received it under a restraint against alienation.[21] In Ontario Mr. Goodhue left a perfectly valid will, the residuary estate to accumulate during the lifetime of his widow; and he directed that if any of his children died during the lifetime of the widow, their children should take their parents' share. This did not suit the children of the decedent: they wanted their share at once and they executed a deed whereby each of them was to have his share at once—in other words, they tried to take away the possibility which the will created in favour of grandchildren. The Legislature in 1871 passed an Act declaring the deed valid; and the court was forced to uphold the transaction.[22] The court did not doubt the power of the Legislature to pass statutes wherein "from oversight or any other cause provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or possible interest by retroactive legislation."

Drainage of agricultural lands across the lands of others is a taking of private property for private use and in violation of the Fourteenth Amendment.[23] We have a whole series of acts

allowing this very thing, and no Fourteenth Amendment stands in the way.

Not far removed from the right of property comes the right to bring an action. It is said that Congress has no power to protect parties assuming to act under the authority of the central government during the Civil War by depriving persons who had been illegally arrested of all redress in the courts.[24] The Act of Congress providing "that any order of the President or under his authority, made at any time during the present rebellion, shall be a defence in all courts to any action or prosecution pending, or to commence for any search, seizure, arrest, or imprisonment, made, done or committed . . ." was, accordingly, held to be invalid.

In Canada we have had statutes of indemnity; *e.g.*, in 1838, after the "Rebellion," an Act was passed[25] which recited that before and during the "insurrection" it became necessary for Justices of the Peace, officers of the militia and others in authority in the Province, and also for loyal subjects, to apprehend persons charged or suspected of joining in the insurrection. The Act then provided that all proceedings brought for such acts should be void, and the persons who had committed them were indemnified; all such proceedings were to be stayed, and if the plaintiffs

went on they should be liable for double costs. No one had the slightest idea that this Act was not perfectly valid.

So in Ireland, a similar Act was passed after the Rebellion of 1798; and also in Cape Colony in 1836, 1847 and 1853; in Ceylon in 1848; in St. Vincent in 1862, and in New Zealand in 1865 and 1867. In Jamaica after the Rebellion of 1865, the Legislature passed an Act of Indemnity which had the effect of preventing the prosecution of actions against Governor Eyre.

It is, indeed, said that the people of a State, by amendment of their Constitution, may validly take away rights of action and other rights as it is considered that they are not thereby imposing a punishment or impairing the obligation of a contract. This was done by the State of Missouri and others; all right of action for anything done during the war by Federal or State troops was taken away.[26]

Some of the differences between the two countries depend upon a principle to which the courts in the United States pay much respect—the principle of equal rights. One judge exclaims, "Can it be supposed for a moment that if the Legislature should pass a general law and add a section by way of proviso that it should never be construed to have any operation or effect upon

the . . . rights, etc., of A. L. or J. G., such a provision would receive the sanction or even the countenance of a court of law?"[27]

The Dominion Act of 1903,[28] gives jurisdiction to the Exchequer Court of Canada to order the sale of any railway at the instance of the Minister of Railways or of any creditor, to appoint a receiver, etc.; but "Sec. 8 of this Act shall not apply to or authorize proceedings against the C. O. Railway . . ."

While in cases of succession duties an arbitrary statutory exemption is sustainable,[29] yet if such an arbitrary exemption is applied only to estates lower in value while those which are larger have no exemption at all, this is in some States void and invalidates the whole statute,[30]—but this seems to be doubted in other courts: Tennessee and Massachusetts.[31] In Ontario, all estates under ten thousand dollars are absolutely exempt, as are all passing to certain relatives under one hundred thousand dollars; and the larger ones have no exemption.

A statute of a State providing for service upon the agent of a non-resident doing business in the State has been held to be void.[32] In Ontario, every non-provincial company before procuring a license, must have an agent within Ontario upon whom service may be made: and every person who

within Ontario transacts or carries on any of the business or any business for any corporation whose chief place of business is without Ontario, shall for the purpose of being served with "writ of summons" be deemed the agent thereof.

A statute attempting to restrict the right of banking to corporations is held in the United States to be bad,[33] although apparently the restriction is good if the business be insurance, at least in Pennsylvania.[34] By a Dominion Act[35] it is provided that every one who uses or assumes the title of "bank," "banking company," "banking house," "banking association," or "banking institution" without being authorised to do so is guilty of an offence rendering him liable to a fine of one thousand dollars, or imprisonment for five years, or both; and only incorporated companies are eligible for authorisation.

In the United States, it seems that an Act requiring persons paying less than twenty-five dollars in taxes to pay a licence fee will be held bad,[36] and a regulation limiting to transients only requirement of a licence is equally obnoxious to equality.[37] But such regulations are of daily occurrence in Canada.

An Act providing for raising money to pay bounties to private producers of beet sugar is invalid in the United States.[38] We have paid

bounties to private producers of steel, pig-iron, etc., and bounties to private producers of beet sugar are not unknown. At the session of 1916, a bounty was voted for the production of zinc.

No city, it is said in the United States, can be allowed to raise taxes with which to aid manufacturing establishments.[39] We do it every day and in most, if not all, of the cities and in many of the towns and even the villages of Ontario.

In the United States, it is decided that taxes must be for a public purpose and while the support of a State university is a public purpose, the creation of free scholarships and allowances to needy students is not, even though these should be granted after public and competitive examination.[40] We would have no difficulty in such a case.

In Illinois and New Hampshire it seems that owners of property cannot be compelled to keep the sidewalk opposite their property clear of snow.[41] But in Toronto many a citizen has found his way to the police court because he has neglected to obey an ordinance to that effect.

A railroad apparently cannot, with you, be made liable for live-stock killed by it, in the absence of negligence on its part.[42] By our Railway Act when any stock at large, whether upon the highway or not, gets upon the property of

the railway and is killed or injured by a train, the railway must pay unless it prove that the stock got at large through the negligence of the owner; and the company must pay for damage to crops, etc., caused by fire, negligence or no negligence. Not wholly dissimilar legislation has been passed in several States, and apparently held good.[43]

Some differences depend upon the hypothesis that the Legislature is an agent, *delegatus:* and of course, Bentham or no Bentham, *delegatus non potest delegare.* For example, a State Legislature cannot authorise a board of health to make general rules; nor can it leave to an official finally to determine what shall be done to make factories and workshops sanitary, or the extent of expropriation for waterworks.[44]

In the Canadian "constitution," Parliament and Legislatures are not considered "*delegatus*" at all—not delegates even of the Imperial Parliament at Westminster, from whose statute the Canadian Legislative bodies derive their powers. The highest court in the Empire has said, "They are in no sense delegates of or acting under any mandate from the Imperial Parliament . . . the Provincial Legislature having . . . the authority to impose imprisonment with or without hard labour, had also power to delegate similar

authority to the body which it created, called the License Commissioners. . . ."[45] "It was argued at the bar that a Legislature committing important regulations to agents and delegates, effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature and not for courts of law to determine." In fact, it may be said generally that anything a Legislature can do itself, it can depute to another subordinate body to do. I consequently do not give particular instances or further pursue this subject.

Where courts have given an interpretation to the words of a statute, it is not open to the State Legislature to put another construction upon these words so as to have a retroactive effect.[46] No such limitation of the power of Parliament or Legislature is thought of in Canada. Moreover there are many statutes (*e.g.*, in insurance) which are expressly made applicable not only to future but also to existing contracts.

The Legislatures in the United States cannot validly provide that cases pending in the Courts under an existing law shall be dismissed.[47] In

1909, the Legislature of the Province of Ontario passed a statute[48] which provided that every action theretofore brought wherein the validity of a certain contract or any by-law passed or purporting to be passed, authorising its execution by a municipal corporation, was attacked, should be "forever stayed." One of such actions came on for trial before me—the evidence had been taken before the passing of the Act but decision not yet given when the Act was passed. I said:[49]

> This action it is plain comes within the letter as well as the spirit of this Act. The Legislature has said that this action shall be stayed. My duty is "loyally to obey the order of the Legislature," the action is accordingly stayed.
>
> While the wording of the statute is that the action shall be "forever stayed," the Legislature has no power to control by anticipation the actions of any future Legislature or of itself; it may be that this legislation may be repealed . . . the result is that the stay ordered by the statute has the effect of causing the Court to retain the action with no proceedings to be taken therein unless and until the legislation is in some way got rid of.

This decision was affirmed on appeal, an appeal hopeless from the very first.[50]

An order to State officers not to engage in politics and not to make public speeches is void.[51]

Our Canadian practice is to continue a man in public office for life, but if he engages in politics or makes public speeches, he is dismissed, at least when the other party come into power—and no one doubts that such an order as has been held void in the United States would be perfectly valid with us.

Then as to the Dominion and Provincial Courts. The construction put upon the statutes of a State by the State Courts is generally followed by the Supreme Court of the United States. The Supreme Court of Canada does not consider itself at all bound by the Provincial Courts. In a case tried by myself in which I gave judgment for the plaintiff, the whole question was one of interpretation of an Ontario statute—the Court of Appeal for Ontario sustained my judgment. In the Supreme Court, the two judges who had come from Ontario agreed in that interpretation, but three judges—one from Quebec, one from Prince Edward Island and one from British Columbia—took another view, and the appeal was allowed. The Judicial Committee, indeed, restored the original judgment.[52]

But I think I have given sufficient instances now to illustrate the radical difference in many respects of the two Constitutions.

1. In the United States the President and the

Governors of the States (speaking generally) have as much power as George III, and in some respects more; the Governor-General and the Lieutenant-Governors are like George V.

2. Times and seasons are set in the United States for change of legislatures, none in Canada.

3. The Government of the United States can claim no powers which are not granted by the Constitution—it is a government of enumerated powers: the Dominion of Canada has all the powers not granted to the Provinces.

4. The Constitution of the United States contains a hard and fast standard set by people of one generation for their successors: that of Canada may be changed in a day.

5. In the United States

> The Moving Finger writes, and, having writ
> Moves on: nor all your Piety nor Wit
> Shall lure it back to cancel half a line,
> Nor all your tears wash out a word of it.

Perhaps in University circles you would prefer the Latin version—here it is:

> It digitus, cerae scribuntur, scriptaque durat
> littera: tu sapiens sis licet atque pius
> "dimidium dele" frustra obtestabere "versum,"
> non fiet lacrimis ulla litura tuis.[53]

No interpretation by the courts of the meaning of the words of the statutes, can the Legislature correct: no contract created by legislation, however unwise, can be cancelled: no grant, however improvident, can be recalled: no action based upon existing law can be stayed or dismissed: no gain, however ill-gotten, can be taken away from one who obtained it by legal means however scaly: no college can be brought under such governance as the whole State may desire and perhaps need, if it can appeal to some old charter or grant.[54]

In the United States the courts are supreme: in Canada, the people through their representatives; in the one country a few men say to the legislating bodies, "Thus far shall thou go and no further," in the other the legislating bodies say to the courts, "Thus far and thus shalt thou go and no further or otherwise."

In the United States, half a dozen men sitting up in a quiet chamber can paralyse the activity of a Senate and House, may say that a measure imperatively called for in the public interests cannot be validly enacted: and the legislators, the people, are helpless—that is called Republicanism, democratic government; and there is searching of soul and shaking of heads, when any one suggests that the people be asked if that little coterie have correctly interpreted the popular

will formerly and formally expressed in a State Constitution. In Canada should the court fail to apprehend the real intention of an enactment, any government which can command the support of the people can at once correct the error.

Paley, when speaking of a view held by some writers concerning the Constitution of England, says: "These points are wont to be approached with a kind of awe: they are represented to the mind as principles of the constitution, settled by our ancestors, and being settled, to be no more committed to innovation or debate, as foundations never to be stirred, as the terms and conditions of the social compact to which every citizen of the State has engaged his fidelity by virtue of a promise which he cannot now recall." Is not that the point of view, the feeling of the American? Paley adds, "Such reasons have no place in our system."

The framers of the Constitution of the United States have used every endeavour to ward off what they consider the worst of all governments, an unbalanced democracy which is supposed to be necessarily pregnant with a democratical tyranny (I use the words of Erskine) thinking (to use the words of Locke) "that the people being ignorant and always discontented, to lay the foundation of government in the unsteady opinion and uncertain

humour of the people, is to expose it to certain ruin." It is in the power of the people to change the Constitution indeed, but not at once—and the "sober second thought" is what is so often spoken of and so often appealed to. Is it always certain that the first thought is wrong: and the second thought right?

With Burke I say "If you ask me what a free government is, I answer, That it is what the people think so, and that they and not I are the natural, lawful and competent judges of this matter." And so I leave it.

No doubt some citizens of this Republic will say: What a barbarous country is Canada! the courts are not secure in their jurisdiction, the interpretation put upon statutes by the court may be reversed by the Legislature, any man may be deprived of his property without due course of law—why, even a legislator after he has been elected does not know how long he may continue such. Surely property must be insecure, enterprise and industry at a discount, the courts an object of contempt, the Government an object of awe not unmixed with terror! What a country for a white man to live in!

So a Canadian who did not happen to know better might exclaim, Why, what's the use of a Senate and House of Representatives or House

of Assembly, when their hands are tied by the letter which killeth, when they cannot even "boss" a court? What kind of a country is it where no matter how offensive and discreditable a government may be, you cannot get rid of it till a time fixed beyond control? What a paper-governed, court-ridden country!

And yet, have we not here an illustration of the saying, "It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men who administer it, which count"?

In your land as in mine the Government and legislators respond pretty well to public sentiment—a little more quickly, a little more slowly—both lands get the government they deserve. At odd times, the courts will with you check for a while useful legislation, but it gets enacted at last some way or another. A lawyer trained in the interpretation of Constitutions, the "Philadelphia lawyer" of proverbial note, can see much difference between "tweedledum and tweedledee"; and a method can always be found, without giving the court or the Constitution too cruel a jolt, for allowing to the people what they really demand and insist upon.

In Canada, nobody is at all afraid that his property will be taken from him; it never is, in

the ordinary case. Our people are honest as peoples go, and would not for a moment support a government which did actually steal; a new government would be voted into power and the wrong righted. We will not submit to have our great public works delayed by cranks or the litigious, but even a crank or litigious person must be paid a full price for his property; our courts I venture to think are as much respected—(excluding myself) are as worthy of respect—as those of any country in the world; many of our best men, men of high type, seek election to the House of Commons and the Legislatures; and if any Government in the United States could be treated to more railing accusations and with more contempt than Canadian Governments are by their political opponents, I should marvel at it. An American feels himself at home at once in Canada, a Canadian crossing the border does not feel that he is entering a foreign or a strange land; neither can notice any difference in the law any more than in the language or in the habits of the people. Once he escapes the custom-house either feels himself a native—unless he is a fool either by nature or through misplaced or spurious patriotism.

Indeed, we are in all but the accident of political allegiance, one people: we have lived together in peace with an international boundary of thousands

of miles, for more than a century (may that peace be eternal), our aims are the same, justice to all under the law, good will to all men, peace and righteousness. With these aims in common, we are working and shall work out our destiny side by side and in much the same way, an example and a blessing to humanity.

NOTES TO LECTURE IV

[1] It has, indeed, been more than suggested that the powers of the Governor-General in Canada are in some cases in excess of the powers of His Majesty at Westminster—the matter is of no importance but is largely academic.

In one particular the Governor-General is at a disadvantage—he cannot confer knighthoods, etc.; he can only recommend the Imperial authorities to have the honour conferred. The constitutional position of the Governor-General in recommending for such honours does not seem well determined (the Cabinet has been known to disclaim responsibility for a recommendation), but an appointment distasteful to the Cabinet would scarcely be made, while it is probable that the Governor-General would not refuse to recommend for such an honour one whom he was asked by the Prime Minister to recommend.

Knighthoods may, perhaps, be compared to University Honorary Degrees—if the President recommends any one for such a degree, it requires rather strong objection on the part of the *Senatus Academicus* to prevent the recommendation carrying; but he would not force a distasteful candidate on the University. Knighthoods are State Honorary Degrees, and carry with them the incidental advantage that the wife acquires also a title for life; the advantages (if any) are purely social and have no political significance.

[2] Representation by Population, "Rep. by Pop.," we have seen had much to do with the creation of the Dominion. See *ante*, Lecture I, p. 28.

[3] The power to make the membership in the Second Chamber hereditary, contained in the Canada Act of 1791,

31 George III, c. 31 (see *ante*, pp. 57, 77, 80, 81), was never exercised, and the provision was not repeated in subsequent Acts.

[4] Even in dealings with the United States, we utilise the British Ambassador at Washington; we conduct our own negotiations, but all treaties, etc., are in the name of the King.

[5] Of course she is interested in common with all the rest of the Empire in all that affects the Empire, but her special concern is Canada.

[6] The difference between King and President has been tersely put thus—the King reigns but does not rule, the President rules but does not reign.

[7] Much of what follows is practically the same as what will be found in my Address before the Iowa State Bar Association at Cedar Rapids, Iowa, June 28, 1912.

[8] Of course there is the power of adding Amendments to the Constitution of the United States—and the State Constitutions are amended from time to time, but that does not affect the truth of what I have said.

[9] At the banquet of the Illinois State Bar Association at Chicago, May 28, 1914, Mr. Henry M. Bates, Dean of the Faculty of Law in the State University of Michigan, said:

"Mr. Justice Riddell remarked that perhaps it would have been as well if the Dartmouth College Case had been decided contrary to the doctrine which we lawyers have struggled with so long. I daresay he is quite right about that, for it seems to be rather the consensus of opinion, that Daniel Webster overdid the matter. Now I was somewhat surprised a while ago when a colleague in the department of history in the University of Michigan informed me that he had recently seen a letter written by Daniel Webster before he undertook the case, a letter to the other side asking to be retained on that side of the question." Proceedings of the Illinois State Bar Association (1914), p. 300.

What I had said was this:

"Not many years ago, in conversation with a retired Justice of the Supreme Court of the United States, I ventured to express the opinion that no harm would have accrued if two-thirds of the cases in that court had been decided the other way; he answered, 'If you leave out the constitutional cases I should agree, and indeed I think you might increase the percentage considerably.' The modesty of one not thoroughly acquainted with the Constitutions of the United States and of the States of the Union, one who lives in a country without a Constitution (and likes it), prevented me when speaking to an authority on these, from questioning my friend's exception. I venture, however, here to submit to you the consideration—What harm would have been done if Daniel Webster had failed in the Dartmouth College case? Your law would have been different, but would it have been worse? Is your law better for the people at large—and it is the people it must always have in its care—than if it were as in England and Ontario? Are even your corporations during the sittings of Congress and Legislature any more comfortable than ours or those in England? And after all, has the effect been much more than to oblige legislatures to introduce into private charters a clause reserving the power to repeal or alter them—just as it is said that practically the whole effect of the Statute of Uses was to introduce five words into conveyances?

"Did the decisions, or either of them, on the constitutionality of taxation of incomes do any good? and would any harm have been done if they had been the other way? No constitutional amendment would have been necessary, but what of it? Would any one have been injured if he were validly taxed under the Constitution as it stood, rather than under an amendment? And does it feel any more pleasant or hurt any less to pay an income tax than if it had been levied under the document of the Fathers?

"Did the 'Dred Scott' decision settle anything? Perhaps

it hastened an inevitable conflict, but did it do more? Was the conflict not inevitable under any decision, and was it rendered less intense, costly, bloody, terrible, by the decision actually given?

"Most hesitatingly and meekly (as becomes an outsider) I venture to suggest to you that all the decisions of the Supreme Court are overborne in importance by the one decision of the Senate of the United States when that body refused to dismiss Andrew Johnson; for in all human probability there will never be another impeachment of a President of the United States for the reason that he does not agree with the majority of the people or of Congress; the President is as firmly seated on his throne and is as truly a monarch for the term for which he is elected as any king or emperor in Christendom. Benjamin Robbins Curtis' success before that tribunal was of vastly more significance and of vastly greater importance to the United States and its people than would have been success in the Supreme Court when he delivered the superb dissenting judgment which will continue to be the greatest glory of his name so long as Courts endure and lawyers reason.

"Does not the decision of the New York Court of Impeachment that a Governor of that State, their two-year King, must behave himself according to their views of honesty and propriety before as well as after his inauguration, overtop in importance the decision of the unconstitutionality of employers' liability legislation? Did this do more than call for an amendment, inevitable if the people wanted it? And what possible harm could have been done had the decision been the other way?" Proceedings of the Illinois State Bar Association (1914), pp. 357, 358.

[10] The Church of England did not "lie down," but formed "Trinity University," which but the other day suspended its University powers and came into our University of Toronto Federation as an Arts College.

[11] Fletcher *v.* Peck, 6 Cranch 87, 136.

[12] De Groff *v.* St. Paul, etc., R. R. Co., 23 Minn. 144.

[13] This case has already been mentioned *ante,* pp. 99, 112, but is here repeated for convenience of reference, Florence *v.* Cobalt (1908), 18 O. L. R. 275.

[14] See Smith *v.* London (1909), 20 O. L. R. at pp. 140, 141.

[15] See Smith *v.* London (1909), 20 O. L. R. at p. 142.

[16] Rockwell *v.* Nearny, 35 N. Y. 307.

[17] See the Revised Statutes of Ontario (1914), c. 247.

[18] Palairet's Appeal, 67 Pa. St. 479.

[19] Frewen *v.* Frewen (1875), 10 Ch. Ap. 610.

[20] Hilliard *v.* Paul, 10 Pa. St. 326.

[21] Spink *v.* Brown, 61 Pa. St. 327; Atter's Appeal, 67 Pa. St. 341.

[22] Re Goodhue (1872), 19 Grant's Chancery Reports (Ontario), 366.

Scarcely a session of the Ontario Legislature passes without legislation changing the dispositions made by will or settlement. The proposed Statute is, in practice, submitted to two Judges of the Supreme Court of Ontario—all Judges of the Supreme Court are paid $1,000 by the Province per annum for this and other services not purely judicial. The Judges take all the circumstances into consideration and advise the Legislature upon the bill, its fairness and justice. Without a favourable report, the bill does not pass in Committee.

[23] Re Tuthill, 163 N. Y. 133.

[24] Griffin *v.* Wilcox, 21 Ind. 370: Johnson *v.* Jury, 44 Ill. 142.

[25] (1838) I Vic., c. 12 (U. C.).

[26] Dupman *v.* Shetel, 41 Mo. 184, 8 Wall. 645.

[27] Lewis *v.* Webb, 3 Mo. 326.

[28] (1903) 3 Edward VII, c. 21 (Dom.).

[29] State *v.* Furnell, 39 L. R. A. 170.

[30] State *v.* Ferris, 53 Ohio St. 34: 30 L. R. A. 218.

[31] See 26 L. R. A. 259: 28 L. R. A. 178.

[32] Calanne *v.* Grat, 92 N. W. 461.

[33] State *v.* Scangal, 15 L. R. A. 474: 44 Am. St. 756.

[34] Commonwealth *v.* Vrooman, 164 Pa. 306: 25 L. R. A. 250.

[35] Revised Statutes of Canada (1906), c. 29, ss. 156, 157.

[36] State *v.* Mitchell, 53 Atl. 887.

[37] McGrand *v.* Marion, 98 Ky. 673: Kinsely *v.* Cotterel, 196 Pa. St. 614.

[38] Michigan Sugar Co. *v.* Auditor General, 124 Mich. 674.

[39] Parkersburg *v.* Brown, 106 U. S. 687: Cole *v.* La Grange, 113 U. S. 1.

[40] State *v.* Switzer, 143 Md. 287.

[41] Gridley *v.* Bloomington, 88 Ill. 554: State *v.* Jackman, 69 N. H. 318. See 44 Pa. 438.

[42] Jensen *v.* Union Pacific R. Co., 21 Pac. Rep. 994.

[43] Frazer *v.* Pere Marquette (1906), 180 L. R. 589.

[44] State *v.* Burdge, 95 Wisc. 390: Schaezlein *v.* Cahannis, 135 Cal. 466: Stearns *v.* Barre, 73 Vt. 281.

[45] Hodge *v.* the Queen (1883), 9 A. C. at pp. 132, 133, 134.

[46] Greenough *v.* Greenough, 11 Pa. St. 489.

[47] State *v.* Adams, 44 Mo. 570.

[48] (1909) 9 Edward VII, c. 19 (Ont.).

[49] Smith *v.* London (1909), 20 O. L. R. at p. 142.

[50] The boy in the story said, "What mother says is so, is so if it isn't so"; we say, "What the Legislature says is law, is law if it isn't law."

[51] Lonthan *v.* Conn., 79 Va. 196.

[52] Thompson *v.* Equity Insurance Company, (1910), A. C. 592: (1909) 41 Can. Sup. Ct. Rep. 491.

[53] Not my version—I wish I could claim it.

[54] The late Prof. Hugo Münsterberg, with that acute appreciation of the psychology of others which characterised him, says of the American, "his democratic belief in the power of black and white is unlimited." If that be so, it will explain much which the Canadian is as yet unable

to understand. ("The Americans," Williams & Norgate, London, 1916, p. 377.)

I may be permitted to add here an extract from my Address on "The Administration of Justice" before the Illinois State Bar Association, 1914 (Proceedings, etc., pp. 8, 9):

"The Court is not (at least in my country) the master of the people, but their servant, supported by them for their own use and in their service; the judge is paid by the people to do their work, and just as soon as the Court is not worth, directly or indirectly, what it costs, it should be abolished—directly in adjudicating upon the rights of litigants, indirectly in preventing civil wrongs, turmoil, assaults, thefts, trespasses, in the time-honored phrase 'maintaining the King's peace.'

"A Court does not exist for itself; it is not an end in itself. A Court is an evil and the less it is called into play the better for the community unless the evils arising from this course will be greater than those arising from the more frequent exercise of its functions.

"When Congress was proposing to give American coasting vessels a privilege in the Panama Canal not granted to other ships, and Britain made a protest, basing her claims upon treaty (I am not going to discuss the rights and the wrongs of the matter, the American people are guardians of their own honour and need no advice or opinion from me or any other non-American), my friend of the United States Supreme Court said to me, 'I hope that question will go to The Hague.' I answered, 'I hope not'; and when he wonderingly asked why, I said: 'I hope there will be no necessity, I hope that the nations will settle the matter without litigation; there is no saying what heart-burnings and discontents may arise over the decision; we in Canada still remember the Alaska Boundary Award, and no one has a right to expect a repetition of the extraordinary good fortune which followed the Fishery Award at The Hague the

other day when each party claimed substantial victory. A settlement between the parties themselves is infinitely to be preferred to a reference or litigation of any kind.' My friend was not wholly convinced; he was an American and consequently thought that 'there is nothing like a Court.'"

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